Supreme Court, U.S.
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No. 97-1674

In The

Supreme Court of the United States

October Term, 1997

JAMES MAY, *et al.*,

Petitioners,

vs.

SHUTTLE, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the National Mediation Board acting at the request of an employer-carrier have the power under the United States Constitution and the Railway Labor Act to use procedures to diminish and nullify existing contract and employment rights of employees under the Railway Labor Act and state law when:

a. the Fifth Amendment to the United States Constitution prevents the National Mediation Board, an agency of the Federal Government, from interfering with or removing petitioners' collective bargaining agreement and contract rights;

b. the employer submits a petition to the National Mediation Board for a single carrier status;

c. the National Mediation Board has exclusive jurisdiction to determine only representational issues and where the Railway Labor Act otherwise provides for an exclusive remedy to maintain collective bargaining agreements;

d. the National Mediation Board does not have jurisdiction to consider a petition by a carrier concerning representational matters;

e. the National Mediation Board converted a petition by a carrier wherein it had no jurisdiction into a petition wherein it took jurisdiction when a union joined the proceeding; and

f. where the lower courts have sanctioned National Mediation Board conduct which extended its exclusive power from representational issues to cover contracts and contract rights.

2. Did the lower court create reversible error when it ruled state law claims of retired and furloughed workers were

preempted by the Railway Labor Act and Employment Retirement Income Security Act where the claims were outside the purview of rules, rates of pay and working conditions and not involved with regulation of retirement benefits?

3. Where nineteen petitioners were called upon to waive rights in order to receive pension benefits, must the waiver comply with 29 U.S.C. § 626 requirements?

4. Whether the loss of petitioners' blue collar jobs at the USAir Shuttle do not sustain causes of action under the Employment Retirement Income Security Act and the Age Discrimination in Employment Act because of a heightened burden of proof standard newly adopted by the lower court in this case but not provided for by any previous decision of this Court, and whether the furloughs in this case sustain caused of action under both ERISA and ADEA.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

This petition is filed by the 86 individuals who were named as plaintiffs in the complaint filed in this case, and were appellants in the United States Court of Appeals for the District of Columbia Circuit. They are:

Ronald Baldwin
Anthony Barone
Robert E. Battle
John P. Blakesley
George A. Bock
Enrique Bonilla
John A. Buttiglieri
Myron E. Carter
James J. Casale
William H. Casimir
Julio C. Colon
Paul J. Colucci
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Ernest H. Cox
Rodney C. Cox
Joseph E. Cronin, Jr.
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Charles F. Dilustro
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Michael Draughn
Walter J. Dungee
William Eifert
John Estevez
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John J. Hassett
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Paul Iacono
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Jesse Jones
Robert E. Jones
Gary D. Kanakis
William P. Kelly
William T. Kennedy
Matthew Leoncavallo
John P. Luti
Frank Marinaro
George B. Marshall
Seth H. Martin
William W. Maryland
James May
Ellis McBurrows
William J. McCarthy
Jerome S. McGowan
Richard A. Miller

Arlene D. Mitchell
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Peter H. Ness
Frederic V. Nickell
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Philip O'Donnell
Judy A. Peterson
Natalie Petrone-Hackett
Anthony R. Primiano
Robert F. Riccuiti
Lance J. Riddick
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Donald F. Tirrell
Thomas W. Turner
Kenneth Wall
William F. Warning
Francis F. Williams
James F. Williams
Harold Young

The respondents are corporations and a labor union who were named as defendants in the complaint and who were appellees in the United States Court of Appeals. They are Shuttle, Inc., USAir, Inc., Citicorp, Citibank, N.A., and the International Association of Machinists and Aerospace Workers, AFL-CIO ("the IAM"). The National Mediation Board has been granted leave to appear as *amicus curiae.*

The IAM is an unincorporated association and an international labor union which represents employees for the purpose of collective bargaining throughout the United States and Canada. The IAM has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *James May, et al. v. Shuttle, Inc., et al.*, No. 96-7233, entered on November 12, 1997. Petitioners seek review of the District of Columbia Circuit's novel and unconstitutional declaration of federal law under the *Railway Labor Act*, 45 U.S.C. § 151, *et seq.* and its incorrect and novel application of law under the *Employee Retirement Income Security Act*, 29 U.S.C. § 1001, *et seq.*, the *Age Discrimination in Employment Act*, 29 U.S.C. § 621, *et seq.*, and the Age Act as amended by the *Older Workers Benefit Protection Act* (OWBPA), 29 U.S.C. § 626(f), to bar petitioners from proceeding to trial on their claims against the respondents.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. It is reprinted in the Appendix at App. A, at 1a-3a. The Order and Memorandum Opinion of the United States District Court for the District of Columbia, Hon. Norma Holloway Johnson, Judge, dated September 5, 1996, *May, et al. v. Shuttle, Inc., et al.*, No 94 cv 01019, was not published. However, the District of Columbia Circuit adopted the entire opinion of the District Court and published it as if it were an opinion of that Circuit. App. A, 2a. The Memorandum Opinion which is, therefore, now the published opinion of the District of Columbia Circuit, is reprinted in the Appendix as App. B, at 4a-34a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated November 12, 1997, was entered when petitioners' timely motion for rehearing was denied without opinion on January 9, 1998. App. C, at 35a-

36a. (Application to the In Banc Court was also denied without opinion on January 9, 1998. App. D, at 37a-38a.) This Court has jurisdiction to review the judgment of the District of Columbia Circuit Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The decision of the Court of Appeals for the District of Columbia Circuit involves the Fifth Amendment to the United States Constitution, (App. F, 51a) the application of Railway Labor Act, 45 U.S.C. § 151, *et seq.*, the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, and the Age Act as amended by the Older Workers benefit Protection Act (OWBPA), 29 U.S.C. § 626(f). App. E, 39a-50a. The decision also involves the Merger Procedures of the National Mediation Board, published at 14 N.M.B. 388 (1987), App. G, 52a-61a.

STATEMENT OF THE CASE

This petition seeks review of the District of Columbia Circuit's decision affirming and adopting as its own opinion the grant of summary judgment by the district court in favor of each of the respondents in this case, thus dismissing all of petitioners' claims without trial. The district court recognized eighteen (18) federal and state law counts in petitioners' complaint, which arise from petitioners' loss of their employment rights and jobs as fleet service workers on the USAir Shuttle.

• The court rejected petitioners' claims under the Railway Labor Act (RLA), holding that it had no jurisdiction to review employee representation decisions of the National Mediation Board (NMB) made in a representative proceeding brought under Section 2, Ninth of the Act (45 U.S.C. § 152, Ninth) at

the request of an employer carrier. App. B, 24a. In so doing the Circuit Court made new law and failed to consider the unconstitutional result which ensued.

• The court rejected petitioners' claims under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, holding that petitioners' evidence did not meet a new, heightened burden of proof standard adopted by the Circuit Court in this case that petitioners "must show specific evidence of unlawful motivation in order to avoid having summary judgment entered against them." App. B, 10a. In so ruling, the court failed to consider or properly apply the law as set forth by this Court in *Inter-Modal Rail Employees Ass'n v. Atchison, T. & S. R. Co.*, __ U.S. __, 117 S. Ct. 1513, 137 L. Ed. 2d 763 (1997), *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993) and *O'Connor v. Consolidated Coin Caterers Corp.*, __ U.S. __, 116 S. Ct. 1307 (1996).

• Petitioners asserted valid state law claims for breach of contract, common law fraud, and breach of fiduciary duty against all respondents. However, the court rejected the state law claims, stating:

> Plaintiffs bring numerous state law claims. The Court rejects *all* of plaintiffs' state law claims because such claims are clearly preempted by the Railway Labor Act or ERISA.

App. B, 28a. (Emphasis supplied.) In so ruling, the court failed to apply the law as set forth by this Court in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S. Ct. 2239 (1994) and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1893 (1981).

• The district court recognized nineteen (19) retired petitioners in this case by stating:

> [A]round November 13, 1993, they were furloughed from fleet service jobs. Shuttle gave these plaintiffs a choice of either a retirement package . . . or severance pay.

App. B, 22a. But in dismissing the claims of these petitioners under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), the court below failed to consider or apply the law as set forth by this Court in *Oubre v. Entergy Operations, Inc.*, No. 96-1291, argued November 12, 1997 and decided January 26, 1998.

A. Background Facts

The underlying action involved the loss of employment of 135 blue collar, airline ramp service workers and cleaners (fleet service workers) who previously volunteered to leave the service of Eastern Air Lines, Inc., and transfer to Trump Shuttle, Inc., based on promises of Donald Trump. Petitioners are 86 of those workers. Trump promised to maintain Eastern Airline collective bargaining rights at the Trump Shuttle, Inc. for these workers. Upon further request, these workers increased job responsibilities and utilization. In a bargained for exchange in 1989, petitioners received a promise of job security "for as long as the airline was flying" at the Trump Shuttle and, in due course, a matching "No Furlough" clause in their collective bargaining agreement at Trump. (App. J, 68a.) The promises of Trump and Trump's collective bargaining obligations to petitioners were assumed in their entirety by respondent Shuttle, Inc. when Trump Shuttle was merged into Shuttle, Inc. in April 1992. The collective bargaining agreement was thus governed by status-quo provisions of the RLA when Shuttle, Inc. discontinued petitioners' employment without notice in 1993.

As further background, in 1992 when Donald Trump threatened bankruptcy, a consortium of banks repossessed the Trump Shuttle, negotiated and signed a *management* agreement with USAir, Inc., and created and certified Shuttle, Inc. as a new carrier d/b/a USAir Shuttle. Shuttle, Inc. filed its Articles of Incorporation and Articles of Merger (with Trump Shuttle, Inc.) stating it would honor all existing contracts, including petitioners' employment contracts at Trump Shuttle.

There was no actual merger of Shuttle, Inc. and USAir, Inc. in this case. The respondents USAir, Inc. and Shuttle, Inc. were separate and distinctly operating carriers at all times pertinent hereto. Nevertheless, the new managing carrier, USAir, Inc., by letter dated April 2, 1992, requested the NMB invoke its *Merger Procedures*, 14 NMB 388 (1987) (App. G, 51a), find USAir, Inc. and Shuttle, Inc. a single carrier for representational purposes, and remove the respondent IAM (a union) as petitioners' voluntarily recognized representative on Shuttle. (USAir, Inc. Petition, App. H, 61a.) On May 12, 1992, the respondent IAM joined in USAir's request at the NMB for single carrier status but did not join in the request to remove the petitioners' representation on Shuttle. No one gave petitioners notice under Section 6 of the RLA, 45 U.S.C. § 156, (App. E, 48a-49a) that USAir's request seeking removal of IAM as petitioners' representative would result in a change or elimination of petitioners' collective bargaining agreement or employment rights at Shuttle, Inc. On April 27, 1992, prior to joining in the separate single carrier merger proceeding at the NMB, the IAM also sought to organize approximately 8,000 ramp service workers at USAir, Inc. (also called fleet service workers) who were unrepresented by any union. On the same date, April 27, the United Steelworkers (a second union) also requested an organizational election among the USAir fleet service workers. The NMB scheduled the organizational representation vote at USAir, Inc. for August 11, 1992. The

Steelworkers union did not join in USAir's merger requests for Shuttle at the NMB. (The Circuit Court's finding that the Steelworkers petitioned the NMB to represent the petitioners, App. B, 7a, is mistaken.) Additionally, there was no dispute among Shuttle, Inc. fleet service workers (the petitioners) as to their representation by IAM. There was no challenge to the IAM's incumbent representation on Shuttle by anyone at any time.

The NMB was presented with an impossible task. It was called upon under its Merger Procedures by USAir to decertify the IAM at Shuttle. The IAM at Shuttle, Inc. was voluntarily recognized. NMB rules clearly stated:

> (1) NO IMPACT OF [THE MERGER] PROCEDURES ON VOLUNTARY RECOGNITION AGREEMENTS.

App. G, 59a.[1]

---

1. Subpart F to the NMB's *Merger Procedures*, entitled "EFFECT OF PROCEDURES," provides:

> (1) *NO IMPACT OF PROCEDURES ON VOLUNTARY RECOGNITION AGREEMENTS OR PROGRESSION OF GRIEVANCES*
>
> a. These procedures are **not a bar to the effectuation of voluntary recognitions** otherwise permissible under the Act. (Emphasis supplied.)
>
> * * *
>
> (2) *NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT*

(Cont'd)

The NMB was without power to decertify IAM representation at Shuttle, Inc. because its rules prevented interference with voluntary recognition.

At the same moment, the NMB was being called upon to conduct a representational election at USAir between two unions. When the ballots were counted one day after the ruling on Single Carrier Status by the NMB, it was discovered that there were inadequate votes for representation. The NMB did not decertify the IAM at Shuttle because it had no power to accomplish this task.

The lower court failed to analyze the NMB dilemma and thereby reach the proper issue: whether the NMB had the *power* to cause the loss of a Voluntarily Recognized Bargaining Agent. Instead, the court ruled that petitioners lost their collective bargaining agent when it concluded:

> Shuttle could have been under no obligation to engage in such bargaining in the absence of a certified representative with which to bargain. **Therefore it is unnecessary for us to decide whether any terms of a collective bargaining agreement may survive the loss of representation.**

App. A, 2a. Through the quoted statement of the Circuit Court

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(Cont'd)

> Existing rights under the Railway Labor Act **shall not be enhanced or diminished by these procedures.** The Board recognizes that when a dispute involves the interpretation or application of an airline collective bargaining agreement, **Section 204 of the Railway Labor Act, 45 U.S.C. § 184, provides that it be referred to an appropriate adjustment board for resolution through arbitration.**

14 NMB No. 103 at p. 395. (App. G, 59a) (Emphasis supplied.)

it is demonstrated that a failure to understand voluntary recognition existed. Moreover, the Circuit Court's finding as to the "absence of a certified representative" for petitioners has no meaning because the IAM's recognition was always voluntary; it was never a "certified representative" at Shuttle. A lack of understanding existed for the further reason that the focus was on the NMB rulings, but those rulings could have "**NO IMPACT ON . . . VOLUNTARY RECOGNITION**." Subpart F, NMB *Merger Procedures.* App. G, 59a.

Petitioners offer this Court the facts that the NMB decision could not affect voluntary recognition and the NMB was without power to make change in existing rights: it could make "NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT." NMB Merger Procedures, App. G, 59a. The NMB could neither enhance nor diminish existing rights by application of its Merger Procedures. *Id.*

The Amicus Brief of the NMB states that it was the finding of the courts below, not the conduct of the NMB, which caused the loss of the petitioners' representation. The Amicus Curiae brief of the NMB states:

> There was no certification to extinguish regarding the Shuttle fleet service employees, because their recognition was voluntary. But, **as the district court found** (Op. 21-22, E0494-495), the single carrier determination followed by the representation election [on USAir, Inc.] that the unions lost, meant that "plaintiffs' representation * * * terminated."

Brief of Amicus Curiae, footnote, p. 12. (Emphasis supplied.) But the dilemma was the result of confusion at the NMB, which was without the power to change petitioners' rights and, indeed, was without power even to entertain USAir, Inc.'s request that those rights be changed. *See* the discussion of *Railway Labor*

Executives Ass'n. v. National Mediation Board, below. The NMB thereby adopted an *ad hoc* approach to the problem it created for itself when it decided to attempt to decertify the petitioners' voluntary recognition at Shuttle.

The NMB offered this explanation to the Circuit Court below:

> On June 30, 1992, the Board decided to send challenged, i.e., provisional, ballots to the Shuttle employees so they could vote in the election and **not be disenfranchised** should the Board **later** rule that Shuttle and USAir were a single carrier.

(Amicus Curiae brief below by National Mediation Board, p. 8.) (Emphasis supplied.)

But the election for petitioners was fundamentally flawed in numerous respects. The NMB ballots gave no guidance or instruction to petitioners concerning the meaning of the ballots at Shuttle, Inc. *See* Notice and Ballot, App. K, 69a-74a. Petitioners felt secure because they knew they were represented by the IAM at Shuttle, Inc., so they could attach no meaning to the ballots. Further still, the ballots had no meaning to them because they were issued on July 10, 1992 — before the NMB single carrier decision on August 10, 1992 — and were required to submit the ballots by mail in order that they arrive at the NMB by August 11, 1992. App. K, 74a. The Single Carrier ruling did not occur until August 10, thereby making it impossible for petitioners to cast their vote while being fully informed of the real issues facing them. Additionally, the ballots were counted one day after the August 10, 1992 NMB merger ruling, in direct violation of NMB procedures requiring a minimum of 21 days to schedule a representation vote. (*See* NMB Representation Rule 11.201-1). Unlike the USAir

employees who were unrepresented, petitioners were thrown into a representational vote. The NMB gave no warning of possible disenfranchisement. NMB offered below that the ballots were "provisional" but failed to inform the 135 Shuttle fleet service workers of the provisional nature of the ballots. The NMB apparently intended the election to have two purposes. One purpose was the representation election at USAir. The other purpose was decertification at Shuttle. But the NMB failed to inform the petitioners of this purpose at Shuttle, Inc. and failed to conduct the decertification election at Shuttle in accordance with its practice, which required the use of a straw-man **representative** to represent the no-union position in a decertification election under the RLA, § 2, Ninth. But in this case, the ballots received by petitioners on July 10, 1992 for an election resulted in the elimination of *any* representative for petitioners on Shuttle. The NMB conduct violated requirements of the NMB Representation Rules because this result (no representative) was not possible under the then current NMB decertification rules of practice for represented groups. The Circuit Court's finding of an absence of a representative after the USAir election, therefore, demonstrates an additional failure to understand NMB procedure and the requirements of RLA, § 2, Ninth for decertification elections applicable to represented groups like the petitioners.

On the question of the petitioner's representational status after August 10-11, 1992, the NMB therefore took contradictory positions in its Amicus Brief below, reflecting its dilemma. Its Amicus Curiae brief submitted below states:

> There was no certification to extinguish regarding the Shuttle fleet service employees, because their *recognition was voluntary*.

Brief of Amicus Curiae, footnote, p. 12. (Emphasis supplied.) But as noted above, in justifying the issuance of "provisional"

ballots to the petitioners on Shuttle, the NMB stated that the ballots were issued to the petitioners so that they would "not be disenfranchised should the Board later rule." (Further still, two years later, the NMB declared that the IAM was reelected as union representative for the petitioners following a 1994 election at USAir.) The issue has been further confused by the lower court decision in this case which seems to provide *only for unions* to represent carrier employees, a restriction not set out in the RLA and contrary to existing NMB rules.

Respondents contended, and the courts below agreed, that petitioners had **no** representative union after events at the NMB of August 10-11, 1992. Therefore, all of their contract rights at the Shuttle were lost. App. B, 24a-27a. In November 1993, Shuttle declared for the first time rights were eliminated. Shuttle furloughed petitioners from their jobs. Petitioners have been without jobs since November 1993. USAir, Inc. and Shuttle Inc. furloughed all of the fleet service workers at Shuttle, Inc. in November 1993 in direct violation of the "No Furlough" clause of their employment agreement at Shuttle and in violation of the status-quo provision in the Railway Labor Act and of the NMB *Merger Procedures*.

The petitioners' work was contracted out to Hudson General, a contractor, who employed workers represented by the IAM. Like the railroad in *Inter-Modal v. Achison, T. & S. R. Co., supra*, which also contracted out the petitioners' jobs in that case, the contracting out to Hudson General here caused no change to Shuttle's corporate structure or day-to-day operation.

Shuttle employees were not provided with an opportunity to integrate into the USAir work force even though they were promised such integration by respondents IAM, USAir, Inc. and Shuttle, Inc. in 1992 prior to the events of August 10-11,

1992, and even though their seniority would have allowed them to displace USAir fleet service workers; thus, it appeared as though the April 2, 1992 single carrier status Petition by USAir, Inc. to the NMB was a sham device to remove petitioner's jobs.

While recognizing that USAir, a carrier, applied to the NMB for a determination of single carrier status, the courts below determined that the NMB had jurisdiction because a union (the IAM) later joined in the proceeding. Thus, a merger ruling made by the NMB at the request of a carrier was held by the court to cause the loss of contract rights. But the IAM's joining in USAir's merger request for single carrier status did not confer power on the NMB that those same merger rules stated it did not have; nor did it confer jurisdiction on the NMB to consider the request. Nor did the union's acquiescence cure the fundamental flaws in the process created by the NMB in this case.

The issue of whether the NMB's exercise of power it did not have to cause the loss of a bargaining agent in a flawed, merger decision of the NMB combined with a flawed union election held on USAir, Inc. but imposed by the NMB under the Railway Labor Act on the petitioners at Shuttle, Inc. caused, in turn, the loss of collective bargaining and employment rights on Shuttle is the subject of this Petition as to the application of the Railway Labor Act.

Shuttle, Inc. offered retirement to nineteen petitioners old enough to qualify. But in order to accept retirement, the nineteen were required to waive the severance pay which was being given to their younger co-workers. The waiver did not comply with the requirements of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f), App. E, 39a-41a, which the courts below failed to consider. Accordingly, the second subject of this Petition is whether the case should be remanded to the Circuit

Court for further review in light of this Court's recent decision in *Oubre v. Entergy Operations, Inc.*, No. 96-1291, argued November 12, 1997 and decided January 26, 1998.

The evidence showed that when Shuttle, Inc. furloughed all 135 fleet service workers in 1993, its President, Mr. Hallcom, was engaged in a "re-engineering" of the Shuttle work force because: (1) he thought the Shuttle work force was "old and aging;" (2) he did not wish to continue to pay the petitioners' medical, welfare and pension benefits, which were guaranteed by contract and provided for by qualified ERISA benefit plans; and (3) because he did not want the petitioners — all of whom were vested under the qualified Shuttle ERISA pension plan — to reach age 55 on the job when they would be entitled to a special pension benefit under the Shuttle's qualified pension plan.

The court below rejected petitioners' claims under ERISA and ADEA by declaring that the contracting out of their jobs to the Hudson General company was a "corporate organizational change" and in light thereof the Circuit Court imposed a higher burden of proof on petitioners than this Court has held otherwise applies to ERISA and ADEA cases. App. B, 10a, 14a. Thus, the issue of whether the loss of petitioners' jobs do not sustain causes of action under ERISA and ADEA because of a newly adopted, heightened burden of proof standard in this case is the third subject of this Petition.

Eighty-six Shuttle Fleet Service Workers joined in the present legal action.

REASONS FOR GRANTING THE WRIT

A.

1. In this case a representation ruling (the single carrier status ruling) made by the NMB pursuant to Section 2, Ninth of the RLA, 29 U.S.C. § 2, Ninth, was held by the Circuit Court to cause loss of a collective bargaining agreement and employment rights under RLA. In *Railway Labor Executives Ass'n v. National Mediation Board*, 29 F.3d 655, (en banc), *as amended*, 38 F.3d 1224 (D.C. Cir. 1994), *cert. denied.* 514 U.S. 1032 (1995) (hereafter, "*RLEA*"), the D.C. Circuit ruled that neither the NMB nor carriers could **initiate** representational disputes. 29 F.3d 662. (This *en banc* ruling confirmed in all respects the ruling of then Circuit Judge Ruth Bader Ginsburg for the initial three judge panel in the same case.) "[T]he [NMB] has *no threshold jurisdiction to act at all* in the absence of a request from the employees involved in a representation *dispute*." 29 F.3d at 662. In direct violation of the *RLEA* ruling, the Circuit Court in this case sanctioned a representational ruling (the single carrier ruling) where the carrier USAir initiated the proceeding and there was no showing of a representation dispute among the fleet service employees (petitioners) at Shuttle. Although the D.C. Circuit recognized the "status quo" under the RLA as applicable to the petitioners while the NMB was deliberating its single carrier ruling, the court then erroneously proclaimed the parties (Shuttle and petitioners) were pursuing a "major dispute" under the RLA, although the court did not identify the dispute. Amplifying the decision of the district court, the D.C. Circuit declared:

> Shuttle could have been under no obligation to engage in such bargaining in the absence of a certified representative with which to bargain. Therefore, it is unnecessary for us to decide whether

> any terms of a collective bargaining agreement may survive the loss of union representation.

The Circuit Court, however, did nullify the contract and petitioners' employment rights. Memorandum Opinion, App. B, 25a-27a.

The decision created new law in the United States because a single carrier status decision was ruled to cause the nullification of a collective bargaining agreement and employment rights under the RLA. In the history of the RLA, there has never been a similar decision giving the NMB power over the status quo provisions of the RLA or to make a ruling that violates the Rules of the NMB.

2. The Fifth Amendment to the Constitution (App. F, 50a) prevents the NMB from removing a property right (contract) without due process. The Supreme Court declared an act of Congress unconstitutional where it interfered with the contractual pension rights of railroad workers. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 346-47, 55 S. Ct. 758, 761 (1935). Property rights cannot be removed by the government without the Fifth Amendment grant of due process. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854 (1935). The right to follow a chosen profession is a property interest protected by the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400 (1959). Accordingly, the Fifth Amendment specifically prevented the NMB here from removing property rights without due process of law. *Railroad Retirement Board v. Alton Railroad Co., supra.* The lower courts, therefore, could not validly sanction the removal of such property rights.

3. Petitioners, therefore, had a right to rely on the provisions in the Railway Labor Act, enacted by Congress to

prevent interruptions in commerce, and on the NMB's faithful adherence to its own Rules and to the Acts' requirements. Petitioners could not anticipate that the NMB, while acting on a representation application of an employer, would act in an unconstitutional manner and outside of its own Rules, practice and authority to deprive them of contractual rights. The courts below acknowledged:

> Eventually, the Shuttle fleet service was not integrated with USAir, in part because of difficulties resolving seniority disputes.

(App. B, 8a.) The court recognized that the *Merger Procedures* of the NMB had been invoked. These rules of the NMB establish procedures and limitations. In particular they provide at 14 NMB 393 that when the merger rules of the NMB are invoked there shall be:

> **NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT**

App. G, 59a. The Circuit Court improperly inferred that NMB's "undeniable sole jurisdiction over representational matters" extended its power to contract disputes under the Railway Labor Act. The issue before the lower court was not a "representational matter." The issue before the court was "a dispute involving the interpretation or application of an airline agreement," specifically a "No Furlough" clause and the "status-quo" provisions. Where the NMB Rules specifically provide that "[e]xisting rights under the Railway Labor Act shall not be . . . diminished by these [Merger Procedures]," App. G, 59a, the court below erred when it dismissed petitioners' claims and diminished petitioners' employment rights under the Act. Petitioners had a right to due process, especially when it involves such significant rights as the appointment or election of employee representatives. *See*

Allentown Mack Sales & Service, Inc. v. National Labor Relations Board, No. 96-795, argued October 15, 1997, decided January 26, 1998; *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180 (1958). The RLA's overriding purpose is promoting stability in rail and air labor relations. *See Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444-45, 107 S. Ct. 1841, 1850-51 (1987); *Chicago and North Western R. Co. v. United Transportation Union*, 402 U.S. 570, 574, 91 S. Ct. 1731 (1971); *Association of Flight Attendants v. USAir*, 24 F.3d 1432 (D.C. Cir. 1994). Stability means workers can expect the provisions of the RLA and the valid Rules of the NMB to be enforced and not discarded by the courts.

4. The Circuit Court then erroneously concluded the removal of a collective bargaining agent resulted in loss of a contract. App. B, 24a-27a. Significantly, in light of its own *Merger Procedures* which prohibit diminishing existing rights, the NMB itself could not take such a position, and it refused to do so, stating to the court below:

> The Board takes no position on what effect this (the single carrier status ruling) had on the existing collective bargaining agreement.

(Amicus Curiae Brief of the NMB, footnote 12.) The Supreme Court has repeatedly emphasized that the NMB's power over representational disputes is exclusive. *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 64 S. Ct. 95 (1943); *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 64 S. Ct. 142 (1943). This exclusivity has now been extended to the nullification of contract and employment rights, which the lower court erroneously declared could not be reviewed. App. B, 25a-26a. In this case, moreover, a carrier made application to the NMB thus depriving the NMB of jurisdiction:

> NMB's conduct in revising its interpretation of RLA to permit carriers or the Board to itself initiate investigation of representation disputes among carriers' employees was a "*gross violation*" of RLA and was judicially reviewable.

Railway Labor Exec. Assn v. NMB, supra, 29 F.3d at 655.

The generaly recognized purpose of the RLA is to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, **to provide orderly and peaceful procedures for preventing the interference by either with legitimate rights of the other**, to protect the rights of individual employees. 45 U.S.C. § 151a. Accordingly this Court is being called upon to determine how an NMB decision on a representational matter abolished a collective bargaining agreement and substantive employment contract rights under the RLA.

B.

5. Finding no reviewable claims under the RLA, the lower court ruled nonetheless that the RLA preempted all of petitioners' state law claims. The holding left the petitioners no avenue to present their evidence and vindicate their state claims that the respondent carriers and union fraudulently mislead petitioners as to the nature of the proceedings being pursued in their names, made promises to them concerning their employment which they did not intend to keep, breached their contract of employment, and failed to represent them in good faith before the NMB and thereafter. In holding petitioners' states claims preempted, the court failed to consider a 1994 Supreme Court

decision. An employee's discharge was held not preempted by the Railway Labor Act. *Hawaiian Airlines, Inc. v. Norris, infra.* The decision established that claims related to rates of pay, rules and working conditions are the **only** claims preempted by the Act. Reversible error was committed here because the lower court ruled RLA preemption applied to petitioners' valid state claims for breach of contract and fraud which are outside the scope of rates of pay, rules and working conditions.

6. By declaring claims preempted by the RLA, the court failed to recognize that preemption occurs only where state law claims involve interpretation or application of the collective bargaining agreement. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 114 S. Ct. 2239 (1994). The purpose of Congress in passing the Railway Labor Act was to promote stability in labor/management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, Topeka and Sante Fe R. Co. v. Buell,* 480 U.S. 557, 107 S. Ct. 1410 (1987). To further this goal, the RLA established a mandatory arbitral mechanism for the "prompt and orderly settlement" of two classes of disputes. The first class of disputes is "rates of pay, rules or working conditions". 45 U.S.C. § 151a. The second class of disputes grows out of the first class of disputes and relates to interpretation of contractual provisions governing rates of pay, rules and working conditions. *Bhd. Of Ry. Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30, 77 S. Ct. 635 (1957). Major disputes seek to establish rates of pay, rules and working conditions which create contractual rights. Minor disputes seek to enforce them. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 302, 109 S. Ct. 2477, 2480, citing *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1289 (1945). Petitioners' rates of pay, rules, and working conditions were being adhered to in 1992, and in 1993

when the petitioners were furloughed. The Circuit Court here erroneously declared a "major dispute" in progress in 1992 (which it did not identify) while the status-quo provisions of the RLA were being observed. In view of the complete failure of the lower courts to apply to petitioners the procedures and limitations set forth in the United States Constitution, RLA and NMB Rules, petitioners pray that this Court must consider the following quoted passage where an NMB decision is used to remove a collective bargaining agreement under the RLA:

> The Constitution is not a statute, but the Supreme Law of the Land to which statutes must conform, and the powers conferred upon federal government are to be reasonably and fairly construed . . . this power must be exercised in subjection to the guarantee of due process found in the Fifth Amendment.

Retirement Board v. Alton, supra, 295 U.S. at 346-47.

7. The state claims of the nineteen retired employees, moreover, could not be preempted by the RLA because retired employees are not covered under the Act. In 1971 the Supreme Court declared retired employees outside the National Labor Relations Act because they are not employees who could affect commerce under the Act. *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div.*, 404 U.S. 157, 188, 92 S. Ct. 383, 402 (1971). Similarly, the 19 retired petitioners in this case should have been allowed to pursue their state claims.

8. Where the lower court here declared these petitioners' state claims preempted by ERISA, the ruling was also in error because ERISA only preempts state claims in the area of pension plan regulation. *Alessi v. Raybestos-Manhattan, Inc., supra*, 451 U.S. at 523, 101 S. Ct. at 1906. If petitioners' ERISA § 510 claims could not be heard because of the valid application of a higher standard of proof than has heretofore been required

by this Court *(see* discussion below), then petitioners should have been allowed to pursue in court their state claims for fraud and breach of fiduciary duty or their equivalent. *Cf. Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065 (1996).

C.

9. As to the claims of the nineteen petitioners who were required to waive their severance rights (which were provided to their younger co-workers) on the day of their mass layoff in return for receiving their retirement rights,[2] the district court declared:

> Shuttle gave these plaintiffs a choice of either a retirement package or severance pay.

App. B, 22a. There was a failure to recognize that the 19 older employees were forced to waive rights in order to receive the retirement package. The waiver came under the provisions contained in 29 U.S.C. § 626(f). App. E, 39a-41a. These nineteen petitioners were required to make their decision on the day they were furloughed in direct violation of the statute. In addition, Shuttle provided them with none of the data or advance disclosures Congress mandated they receive so as to allow them to make an informed judgment under the statute, again in plain violation of the statute. In *Oubre v. Entergy Operations, Inc.*, No 96-1291, argued November 12, 1997, decided January 26, 1998, this Court held that a waiver involved

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2. Although the district court found that the retirement benefits offered to these workers were "enhanced" benefits, that fact was disputed in the record and should not have been the subject of a summary judgment decision. Petitioners contended and showed that the retirement benefits they received on being laid off by the Shuttle in November 1993 were the standard retirement benefits they had already earned at the Shuttle.

with severance pay must satisfy the enumerated requirements of 29 U.S.C. § 626(f)(1). The Circuit Court decision in this case failed to decide the important waiver question presented by petitioners, thereby directly conflicting with this Court's decision in *Oubre*. Petitioners pray that the Court send this matter back for further proceedings in light of this Court's decision in *Oubre*.

D.

10. Questions of fact remained for the jury in regards to petitioners' claims under ERISA and ADEA. By requiring that petitioners "must show specific evidence of unlawful motivation in order to avoid having summary judgment entered against them," App. B, 10a, the Circuit Court holds petitioners to a higher standard of proof than previously set forth by this Court. The Circuit Court thus failed to consider and apply properly the law as set forth by this Court.

11. Petitioners' evidence in a summary judgment proceeding was powerful and not fully set out by the courts below. Because Donald Trump hired the most senior workers at Eastern Airlines to staff the Trump Shuttle, the Shuttle President Hallcom stated when he furloughed the petitioners in November 1993 that the Shuttle was a five year old company whose employees have 25 years seniority. Ms. Patricia Evers, Director of Administration and Benefits at Shuttle, Inc., testified in her deposition and by affidavit:

> [S]huttle employees were an aged and aging group and [Shuttle President Hallcom] acted with a view toward reducing the age of the work force through a "re-engineering" plan. When referring to the Shuttle work force in general he would usually refer to it as an "aging and old" work force.

> By older workers I mean those workers **such as the Fleet Service employees [petitioners] whose average age was relatively high**. Mr. Hallcom was obsessed with the aging work force at Shuttle and the costs associated therewith. As president, Mr. Hallcom took every opportunity to reduce the age of the Shuttle work force.
>
> [Shuttle President Hallcom's] concern about the older age of the work force also involved the higher contributions Shuttle had to make to its [ERISA benefit] Plans **because of the age and aging of [Shuttle] employees**. He repeatedly complained both about the high and increasingly higher level of those contributions and about the related high and increasingly higher level of insurance payments for health plans **because of the increasing age** of [the Shuttle] work force.
>
> Mr. Hallcom made it plain to me that he did not want to pay benefits and retirement costs associated with Shuttle's "old and aging" workforce.
>
> I am talking about the fact that as these employees aged and as more of them accrued years of service, they were going to become entitled to the early retirement supplement [pension benefit] that Shuttle had to pay. It was for time at Eastern, but the Shuttle was going to have to pay it. These were the costs [Hallcom] didn't like.

Evers Declaration, 10/20/95; Evers Dep., 172-73, 195. The furlough was motivated by an illegal management desire to reduce costs associated with the Shuttle's "old and aging workforce" and to prevent them from continuing to obtain their

medical, welfare and pension benefits, especially their special pension benefit at age 55. *Inter-Modal Rail Employees Ass'n v. Atchison, T. & S. R. Co.*, __ U.S. __, 117 S. Ct. 1513, __, 137 L. Ed. 2d 763, 769-70 (1997).

12. The Circuit Court failed to consider these and other disputed facts of the case on summary judgment; indeed, it failed to address this Court's decision in *Inter-Modal*. Instead, the Circuit Court held that petitioners' evidence did not meet a new, heightened burden of proof standard adopted by the Circuit when it defined the outsourcing here as a "corporate organizational change" (as previously set out in *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995)) thus avoiding the impact of petitioners' evidence in favor of summary judgment. App. B, 10a, 14a. In so ruling, the court (1) seems to ignore the direct and specific nature of petitioners' evidence; and (2) fails to apply or consider this Court's decision in *Inter-Modal* where this Court made it clear that it is unlawful to:

> discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary of an employee benefit plan for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Inter-Modal Rail Employees Ass'n v. Atchison, T. & S. R. Co., supra 117 S. Ct. at __, 137 L. Ed. 2d at 769-70. Although this Court in *Inter-Modal* cited *Andes* favorably for a different proposition,[3] it did not adopt the *Andes* standard of proof in *Inter-Modal*, even though in *Inter-Modal* this Court was confronted with precisely the same outsourcing of the petitioner-employees' jobs as it is here. The Circuit Court in this case failed completely to consider this Court's decision in *Inter-Modal*

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3. *Inter-Modal*, Footnote, 137 L. Ed. 2d at 768.

when dismissing petitioners' ERISA claims. Similarly, the Circuit Court erred in failing to apply the traditional standard of proof for petitioners' Age Discrimination Act claims as set out by this Court in *O'Connor v. Consolidated Coin Caterers Corp, supra*, 116 S. Ct. At 1309. For these additional reasons, petitioners pray that the matter be remanded for further proceedings as to the applicable standard of proof in light of the decision in *Inter-Modal*.

13. Lastly, but not insignificantly, this case presents the interrelationship between age and pension eligibility which the Supreme Court anticipated in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). Petitioners' evidence showed that Shuttle's President Hallcom, who made the decision to furlough the petitioners, "target[ed] employees with a particular pension status on the assumption that these employees are likely to be older." *Hazen Paper Co. v. Biggins, supra*, 507 U.S. at 612, 113 S. Ct. 1707-08. As Patricia Evers noted, all of the petitioners were vested, had many years of seniority because of their age and, because of their age, were candidates for a special pension benefit at age 55, which Hallcom "didn't like;" his view was that the Shuttle work force was "old and aging" and that he should "re-engineer" it to make it younger. This case, therefore, raises the question posed by the Court in *Hazen Paper* but not resolved: whether "the decision to fire the employee is motivated both by the employee's age and by his pension status," *Id.* at 613, 113 S. Ct. at 1708, and whether, therefore, there are sustained violations of *both* ERISA and ADEA. Petitioners respectfully submit that: (1) the facts in this case demonstrate that: (a) petitioners were targeted for furlough because of their qualification to receive increasingly higher pension benefits and a special pension benefit at age 55; and (b) their furlough was motivated by *both* age and pension status; and (2) such facts sustain causes of action under both ERISA and ADEA. The lower courts failed to consider the evidence and the issue. This Court should grant *certiorari* to resolve the question in this case.

CONCLUSION

Congress granted exclusive jurisdiction to the NMB over representational issues. Congress vested the Railway Labor Act exclusive jurisdiction over collective bargaining agreements dealing with rules, rates of pay and working conditions in the railroad and airline industries. One hundred and thirty five workers were denied status-quo protection and denied the benefit of a "No Furlough" clause in their collective bargaining agreement and employment contract.

The court below created new law when it ruled that a Single Carrier Status Ruling by the NMB could violate the status-quo provisions in the RLA and diminish existing rights. New law was created when the lower court ruled the NMB was empowered to remove a collective bargaining agreement under the RLA. Congress granted the RLA exclusive jurisdiction and provided status-quo provisions. Congress gave the NMB exclusive jurisdiction over representational issues and the NMB rules specifically provide for limitations and protections, and for dispute resolution where the dispute results from invoking the NMB Merger Rules, none of which were complied with or applied in this case.

The Circuit Court failed to consider the Constitutional deprivation of a "property" right through the action of the NMB, a Federal Agency. The court failed to recognize the removal of a contract is removal of a property right that requires due process under the Fifth Amendment.

Congress intended contracts negotiated under the RLA to continue in a status-quo posture until all of the steps provided in the Act were satisfied. Congress declared the goal of the Railway Labor Act to promote the free flow of commerce and to provided legitimate rights for both employees and employers. That did not occur in this case.

The lower court decision has the effect of rewriting the RLA. It gives NMB power to interrupt the free flow of commerce and the stability of labor relations in the transportation industry by voiding a collective bargaining agreement in violation of its own rules.

Retired workers are not under the RLA because they cannot influence the flow of commerce. The Court ruled in error stating their claims were preempted by the RLA.

The Supreme Court should grant certiorari to decide the important RLA issues raised by this case.

Nineteen (19) plaintiffs were forced into retirement and required to waive benefits given to younger employees. Waiver of the right to severance pay came under the purview of 29 U.S.C. § 626(f)(1). The waiver could not be deemed knowing and voluntary unless it satisfied the enumerated requirements of 29 U.S.C. § 626(f)(1). That statute was not applied here. The case should be remanded for further review in light of this Court's recent ruling in *Oubre v. Entergy Operations, Inc.*

An alternative and significantly persuasive reason for the Court to grant certiorari in this case is the complete failure of the lower courts to apply the law as set out by this Court in its recent and important decisions regarding ERISA, ADEA, and OWBPA and to adopt in this cause a new, heightened standard of proof. Additionally, this case raises the issues of whether these statutes otherwise preempt valid state causes of action; and whether Shuttle's conduct in this case violate both ERISA and ADEA, a question which the Court anticipated in *Hazen Paper Co. v. Biggins* but did not decide. The proper application of these important federal laws, in the face of new and improper uses thereof by the lower courts in this case, is now before the Court.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED NOVEMBER 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 20, 1997 Decided November 12, 1997

No. 96-7233

James May, et al.,

Appellants

v.

Shuttle, Inc., et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01019)

Before: SILBERMAN, WILLIAMS, and ROGERS, *Circuit Judges*.

JUDGMENT

This cause came to be heard on the record on appeal from United States District Court for the District of Columbia, and was briefed and argued by counsel. On consideration thereof, it is

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

ORDERED and **ADJUDGED**, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, by this Court, that the district court's memorandum opinion in *May v. Shuttle, Inc.*, No. 94cv01019 (D.D.C. Sept. 5, 1996) is hereby published as if it were an opinion of our court. We note, however, that the collective bargaining agreement between Trump Shuttle, Inc. and the International Association of Machinists and Aerospace Workers expired on December 31, 1989. Thereafter, the only function the agreement could have performed would have been to serve as the temporary "status quo" while the parties pursued the "major dispute" collective bargaining procedures of Sections 5 and 6 of the Railway Labor Act. But for the reasons made clear by the district court, Shuttle could have been under no obligation to engage in such bargaining in the absence of a certified representative with which to bargain. Therefore it is unnecessary for us to decide whether any terms of a collective bargaining agreement may survive the loss of union representation (an issue which we previously addressed in passing). *See Association of Flight Attendants v. United Airlines, Inc.*, 71 F.3d 915, 918 (D.C. Cir. 1995). It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 41(a)(1) (January 1, 1994). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Appendix A

Per Curiam
For the Court:

Mark J. Langer, Clerk

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED SEPTEMBER 5, 1996, ADOPTED BY THE COURT OF APPEALS BY THE JUDGMENT DATED NOVEMBER 12, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Issued September 5, 1996

Civil Action No. 94-1019(NHJ)

James May, et al.,

Plaintiffs

v.

Shuttle, Inc., et al.,

Defendants

MEMORANDUM OPINION

Plaintiffs are eighty-six former USAir Shuttle fleet service workers.[1] The five defendants are Shuttle, Inc. ("Shuttle"), USAir, Inc. ("USAir"), International Association of Machinists and Aerospace Workers ("IAM"), Citicorp, and Citibank, N.A. Before the Court are the motions for summary judgment filed

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1. Two of the original plaintiffs, Raymond Heim and Pierre L. Schrichte, have been voluntarily dismissed. One of the original plaintiffs, Kenneth Wall, is now deceased and the administrator of his estate has been substituted.

by all defendants, as well as the motion of plaintiffs for summary judgment on the issue of the single carrier proceeding and the motion of nineteen of the plaintiffs ("Barone *et al.*") for summary judgment on certain age discrimination issues. Shuttle has also filed a cross-motion for summary judgment on the issues raised by Barone *et al.* Altogether, there are seven motions for summary judgment to be resolved at this time. The Court heard oral argument from the parties on all seven motions on June 21, 25, and 27, 1996. Upon consideration of the motions, the supporting and opposing memoranda, the oral argument of counsel, and the entire record herein, the Court concludes that it must grant the motions of all defendants and deny the motions of plaintiffs.

Background

Most of the plaintiffs formerly worked at Eastern Air Lines as fleet service workers for the Eastern Shuttle. The Eastern Shuttle offered hourly, unreserved flights between New York and Washington, and between New York and Boston. Plaintiffs' basic job duties included handling baggage, cleaning aircraft, and guiding aircraft to and from passenger gates. Plaintiffs were represented by IAM, which had negotiated a collective bargaining agreement with Eastern on plaintiffs' behalf. In 1989, in the midst of a prolonged strike, Eastern sold the Shuttle to Donald Trump. He financed the purchase through a $380 million loan from a syndicate of twenty-two banks, including defendant Citibank. The newly named Trump Shuttle began operations on June 7, 1989. Trump hired plaintiffs to staff the Trump Shuttle, and Trump Shuttle and IAM entered into a collective bargaining agreement. Forty-nine plaintiffs worked at LaGuardia Airport in New York, New York ("LaGuardia"), twenty-three worked at Logan Airport in Boston, Massachusetts

("Logan"), and fourteen worked at Washington National Airport in Arlington, Virginia ("National").

By 1990, Trump Shuttle and Donald Trump were experiencing serious financial difficulties. Trump Shuttle never made a profit, in part because of the large debt incurred by Trump to purchase and upgrade the Shuttle. By September 1990, the Trump loans were in default and the banks sought to restructure the debt. The banks decided to assume ownership of the Shuttle and began to search for a major airline to manage it in order to avoid selling the Shuttle in the depressed airline market. They decided to attempt to improve the Shuttle's operating performance, contemplating a sale at a later date.

After failed negotiations with Northwest Airlines, the banks reached an agreement with USAir. The complex management agreement with USAir provided that USAir would manage the Shuttle for ten years, with an option to buy. Under the agreement, USAir would be responsible for Shuttle operations, including fares, financial record keeping, advertising, promotions, aircraft maintenance, and labor relations. USAir would operate the Shuttle under the name "USAir Shuttle." Shuttle would continue to operate as a separate airline under its own operating certificates issued by the Department of Transportation ("DOT") and the Federal Aviation Administration ("FAA") to allow the airline to be sold if USAir decided not to exercise its option to buy the Shuttle. On April 7, 1992, Trump Shuttle merged into a newly created corporation, Shuttle, Inc., which became the corporate successor of Trump Shuttle. On April 12, 1992, the USAir management agreement closing occurred.

The DOT and FAA certificates required the Shuttle to maintain responsibility for its own flight operations (including

pilots and flight attendants), but did not require Shuttle and USAir to separate the ground service employees. USAir planned to maintain separate groups of flight personnel but to integrate the ground service employees of USAir and Shuttle, including the fleet service workers, and treat them as a single workforce. IAM had demanded that USAir agree to integrate the ground service employees before IAM would approve the USAir management agreement. Without the approval of IAM, it appears that USAir could not have entered into the management agreement. The large group of fleet service workers at USAir (there were more than 8,000 USAir fleet service workers and 135 Shuttle fleet service workers) was not represented by a union.

In order to integrate the two groups of employees, USAir, IAM, and Shuttle had to resolve numerous issues, including union representation. USAir and IAM agreed to resolve representation questions by requesting the National Mediation Board ("NMB") to issue a ruling that, for purposes of representation under the Railway Labor Act ("RLA"), USAir and Shuttle were a "single carrier." On April 2, 1992, USAir filed a petition with the NMB seeking single carrier status. On May 12, 1992, IAM joined USAir's petition.

Both the United Steelworkers of America and IAM petitioned to represent the fleet service workers. On August 10, 1992, the NMB ruled that USAir and Shuttle constituted a single carrier for purposes of union representation, and an election was held to decide which union, if any, would represent the combined group of fleet service workers. When the votes were counted, the NMB announced that less than a majority of the fleet service workers had voted for union representation. Accordingly, the result of the election was that the combined

group of fleet service workers would not be represented by a union.

After the election, the fleet service workers at Shuttle were no longer treated as if they were represented by a union. Union dues were no longer deducted from their paychecks after the election. The IAM notified plaintiffs by letter dated August 31, 1992, that they were no longer represented by the union. Eventually, the Shuttle fleet service was not integrated with USAir, in part because of difficulties resolving seniority disputes.

In March 1993, after the NMB certified the election result, Shuttle changed several conditions of plaintiffs' employment, including extending the work hours and limiting overtime pay. Also in March 1993, Shuttle furloughed thirty individuals in the fleet service group — twenty-two at LaGuardia, five at Logan, and three at National. Ten of those individuals are plaintiffs here. The decision to furlough those fleet service workers was made by Terry V. Hallcom, President and CEO of Shuttle, based on his conclusions that he could cut costs and replace substandard work by using an outside contractor. Shuttle contracted with Hudson General Corporation to perform the work. In November 1993, eighty-eight individuals in the fleet service group were furloughed or elected voluntary retirement in lieu of furlough—forty-three at LaGuardia, twenty-four at Logan, and twenty-one at National. Seventy-three of those individuals are plaintiffs here.[2] At that time, Shuttle subcontracted all fleet service work to Hudson General. Hallcom reached the decision to subcontract the remaining fleet service workers after

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2. The remaining three plaintiffs were furloughed on the following dates: John P. Luti (Logan) — September 22, 1992; Harold Young (Logan) — September 22, 1992; and Lance J. Riddick (LaGuardia) — July 3, 1993.

determining that approximately $2 million a year could be saved by subcontracting the work. Shuttle had no control over the selection of employees by Hudson General.

Furloughing the fleet service workers was part of Shuttle's cost cutting strategy in its attempt to make the airline profitable and recover Trump's debt. From April 12, 1992, to August 31, 1995, the total number of Shuttle employees was reduced from 972 to 553.

Discussion

There are eighteen counts in plaintiffs' complaint. Plaintiffs bring their federal statutory claims pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1994), the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1994), the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-09 (1994), and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1994). Plaintiffs also bring state law claims against all defendants and a claim against the IAM for breach of the duty of fair representation. The Court will first address the claims against USAir and Shuttle (parts I-VI, below), and will then address the remaining defendants separately (parts VII-VIII, below).

I. ERISA, 29 U.S.C. §§ 1001-1461 (1994), Counts 9-13

Section 510 of ERISA guarantees that no employee will be terminated where the purpose of the discharge is the interference with the employee's pension rights. 29 U.S.C. § 1140 (1994). Plaintiffs claim that defendants violated ERISA when defendants furloughed plaintiffs without allowing them

to work up to age sixty-five (Count 9); when USAir did not offer plaintiffs the same benefits it offered to non-Shuttle employees (Count 10); when defendants furloughed plaintiffs because defendants did not want to pay for greater health care benefits as plaintiffs got older (Count 11); when defendants furloughed plaintiffs because they did not want to assume the increasingly greater risk that plaintiffs would suffer a long term disability (Count 12); and when defendants furloughed plaintiffs to keep plaintiffs from accruing further benefits under the 401(k) retirement plan (Count 13).

This Circuit has recently noted that a "corporate organization change," such as the decision to sell a subsidiary, is generally not the type of action that is prohibited by ERISA. *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1336 (D.C. Cir. 1995). Because plaintiffs were furloughed as part of a reduction in force, and the entire fleet service group was eliminated and replaced with an outside contractor, the Court considers their furloughs to be a "corporate organizational change." Accordingly, plaintiffs must show specific evidence of unlawful motivation in order to avoid having summary judgment entered against them.

Even if the furloughs are not considered a corporate organizational change, but are to be treated as the discharges of individual employees, plaintiffs must still pass a high hurdle to prove that this case should go to trial. Using the classic *Burdine* framework, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court must determine if plaintiffs have established a *prima facie* case: (1) prohibited employer conduct; (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir. 1990), *cert.*

denied, 111 S. Ct. 1310 (1991). If plaintiffs establish a *prima facie* case, then defendants must articulate a legitimate, nondiscriminatory reason for their actions. If defendants meet that burden, then plaintiffs must prove that the proffered reason is pretextual. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Defendants have presented evidence showing that the motivation behind the furloughs and outsourcing of the fleet service work was to save money. Hallcom Aff. ¶¶ 16-22. In his affidavit, Terry Hallcom stated that Trump Shuttle never made a profit and by early 1990 was in dire financial straits because of the large debt incurred to purchase and upgrade the Shuttle. Hallcom Aff. ¶ 7. By late September 1991, Trump Shuttle was nearly unable to generate sufficient revenues to pay its operating costs. Hallcom Aff. ¶ 9. After the banks took over and USAir entered the management agreement, the Shuttle began to cut costs and improve operations to enable it to become economically self-sustaining. Hallcom Aff. ¶ 9. In 1992, the Shuttle increased its cost cutting measures, including job force reductions in all classifications — management, pilots, fleet service, mechanics, and flight attendants. Hallcom Aff. ¶ 16. From April 12, 1992, to August 31, 1995, Shuttle reduced its number of employees from 972 to 553, as well as reducing the number of aircraft and backup flight management, renegotiating vendor and service contracts, and changing operations and maintenance procedures. *Id.* In March 1993, Shuttle outsourced the overnight cleaning workers in order to cut costs and get higher quality service. Hallcom Aff. ¶¶ 18-20. Pleased with the savings in money and the improvement in services, Hallcom decided to outsource the remaining fleet service work to Hudson General for a cost that was 50% less than the Shuttle's existing cost for the work. Hallcom Aff. ¶ 22. According to Hallcom,

since 1992 the Shuttle has saved more than $21 million a year as a result of these cost cutting measures, which equals a 25% reduction in total operating expenses. Hallcom Aff. ¶ 25. In 1989, the Shuttle lost over $66 million; in 1994, the Shuttle generated a small profit and is presently an economically self-sustaining business. *Id.* Hallcom states, "Shuttle's reason for discharging Plaintiffs was economic necessity. The furloughs were effectuated by a company in financial distress and were but one part of a massive cost reduction program applied to every facet of the Shuttle's operation in an attempt to reduce costs sufficiently to allow the Shuttle to survive." Hallcom Aff. ¶ 26. Because the decision to furlough plaintiffs was motivated by the desire to cut costs and save the airline, defendants claim that there was no unlawful intent to deprive plaintiffs of pension benefits.

In response to defendants' evidence that the motivation for the furloughs was to cut costs, plaintiffs complain about documents they allegedly did not receive in discovery. Plaintiffs claim, without any citations to the record, that they did not receive notice of changes to the pension plan in 1991 and that such changes were not reported to the Department of Labor. Plaintiffs testified in their depositions that Gordon Linkon and Terry Hallcom of Shuttle, as well as plaintiffs' manager Joita McGlynn, told them that no changes would be made when USAir first took over the management of the Shuttle. Pls.' Exs. 45-49. Plaintiffs also testified that representatives of USAir stated that Shuttle fleet service workers would be integrated with USAir fleet service workers with their full seniority. Pls.' Exs. 52-53, 55, 59. Plaintiffs submit a memorandum from Hallcom to "All Employees," dated March 6, 1992, (five months before the combined fleet service workers voted against union representation) stating that "[e]ffective day one [of USAir's

management of Shuttle] there will be *no changes*. Any changes that may occur will be done systematically as we begin to get established as the USAir Shuttle." Pls.' Ex. 69. Plaintiffs submit evidence that the Shuttle's pensions generally were "underfunded" based on actuarial calculations of projected benefits versus projected assets. Pls.' Exs. 70-72.

Plaintiffs also cite to the affidavit and deposition testimony of E. Patricia Evers, former Director of Administration at the Shuttle. Evers testified that Hallcom referred to the Shuttle work force as an "old and aging work force." Evers Dep. at 195. She testified that Hallcom talked with her about the cost of the pension plan and was concerned that the annual contributions Shuttle had to make to the plan based on the actuarial tables was too high. *Id.* at 159-60; 171. She testified that Hallcom was concerned about the amount of money Shuttle had to pay to the pension plan for the time that employees had worked at Eastern Airlines. *Id.* at 173-74. She testified that, prior to the decision to furlough the fleet service workers, Hallcom instructed the Shuttle's actuaries to compute the cost savings to the Shuttle under different scenarios of the fleet service workers' pension plan, such as if the plan were "frozen." *Id.* at 186-94. She also testified that she was not involved in the decision to furlough plaintiffs and did not discuss the decision with Hallcom, who made the decision. Evers Dep. at 79, 153-59. Hallcom did not tell her why the fleet service workers were furloughed.

In response to Shuttle's interrogatory, "Do you believe that Shuttle ever acted with a motive to deprive you of any retirement, health or other benefit associated with your employment? If so, identify every statement, fact or document that supports your belief," every plaintiff uniformly answered, *inter alia*, "a 'USAir Shuttle spokesman' advised People Magazine, that I was laid

off because the Shuttle wanted 'an optimized cost-efficient operation'," and "President Hallcom advised People Magazine that I was laid off because 'the Shuttle management needed to cut jobs to cut costs'," and "President Hallcom informed Crain's New York Business in January 1994, that since November 1993 Shuttle has been paying off interest and principal on its outstanding debt to Citicorp and Citibank. The cost 'savings' that allowed Shuttle Inc. to pay the bank resulted from my layoff." Pls.' Answers to Interrog. 10. Plaintiffs also testified in their depositions that they believed they were furloughed to cut the costs of their salaries, benefits, health plans, and pension plans. *See, e.g.*, DiSpigno Dep. at 105.

Under *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1338 (D.C. Cir. 1995), in a case like this one, "the plaintiffs can satisfy § 510 only by showing that some ERISA-related characteristic special to the unit (such as its having a clearly above-average proportion of employees with pension rights about to vest) was essential to the firm's selecting the unit for closure or sale." The evidence shows that Shuttle was in dire financial straits and, since 1992, has undergone dramatic cost cutting measures, including reducing its number of employees by 419 persons — over 40% of the workforce. It is hard to imagine, and plaintiffs have failed to show, that defendants targeted these eighty-six persons to furlough because of their pension costs. The problems that Shuttle was facing were much larger than plaintiffs' pension costs — for example, the fact that Shuttle lost over $66 million in 1989 and still had tremendous debts to repay. Although the fleet service workers were an "aging" group of employees and Hallcom was concerned about the cost of the contributions that Shuttle was making to their pensions, such evidence is not enough to show a specific discriminatory intent. Plaintiffs must show more than that Shuttle furloughed plaintiffs to save money.

Appendix B

As the Fourth Circuit explained:

> [Plaintiff] tries to save his claim by citing statements that [defendant] sought to meet its "financial need" by terminating him, and that financial need necessarily includes pension costs. [Plaintiff's] suggestion that [defendant] acted illegally because it acted to save money proves too much. Under that reasoning, any actions by an employer that result in savings would be suspect. It is obvious that benefit costs make up a large amount of the costs of an employee to a company, and that pension rights are a substantial component of benefit costs, but these undeniable propositions are not sufficient standing alone to prove the requisite intent by the path of pretext.

Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 239 (4th Cir. 1991).

With respect to plaintiffs' furloughs, the undisputed evidence shows that Shuttle furloughed plaintiffs in order to cut costs and save the company. Plaintiffs have presented no evidence to show that Shuttle was motivated by any other factor. Because plaintiffs cannot show a specific intent to discriminate, they have failed to establish a *prima facie* case. Even if they had established a *prima facie* case, their claim would fail because they did not show that Shuttle's legitimate, nondiscriminatory reason for the furloughs was a pretext.

With respect to plaintiffs' claims that USAir did not offer plaintiffs the same benefits as non-Shuttle USAir employees, the Court notes that the planned integration of Shuttle fleet

service workers into the USAir work force never took place. According to Hallcom, the integration plans failed because of the difficulties encountered by the IAM in resolving an intra-union dispute from attempting to combine the senior Shuttle mechanics into the resistant USAir mechanic work force and the parallel issue presented by the fleet service integration. Hallcom Aff. ¶ 14. Simply because defendants intended to integrate the workers, and the integration plans failed, does not give rise to a claim under ERISA. Plaintiffs have no claims to USAir pension benefits because they were never members of a USAir pension plan.

With respect to plaintiffs' factually unsupported claims that Shuttle violated ERISA by failing to disclose certain pension plans to plaintiffs and the Department of Labor, plaintiffs cite *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996). *Varity* does not apply to the present case, however, because *Varity* was not an ERISA § 510 case and all five ERISA counts in plaintiffs' complaint come under § 510. Because plaintiffs have failed to provide any evidentiary support for this claim, and have not brought a count in their second amended complaint alleging any failure of Shuttle to disclose the pension plan to plaintiffs or the Department of Labor, the Court will reject these claims. The Court will grant the motions of USAir and Shuttle for summary judgment on the ERISA counts.

II. ADEA, 29 U.S.C. §§ 621-34 (1994), Counts 16, 17, 18

The Court of Appeals for this Circuit has stated:

> To make out a prima facie case of age discrimination . . . a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination

> was "a determining factor" in the employment decision. Such an inference is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was not hired, and (4) was disadvantaged in favor of a younger person. Once a prima facie case has been established, the employer has the burden of producing evidence tending to show that the applicant was denied employment for a legitimate, nondiscriminatory reason. If the employer does so, and if his evidence is credible, the plaintiff must show by a preponderance of the evidence that the employer's asserted legitimate reason is merely pretextual. . . . The plaintiff, who at all times retains the burden of persuasion, must then show by a preponderance of the evidence that age was "a determining factor" in the employer's decision.

Cuddy v. Carmen, 694 F.2d 853, 856-58 (D.C. Cir. 1982) (citations omitted). The Supreme Court has clarified that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Plaintiffs must show that age was a factor in the decision to furlough them. The *Burdine* framework discussed above applies to ADEA cases.

Some of the plaintiffs were not forty years old at the time of the furloughs. The ADEA provides that one must be at least forty years old to bring an ADEA claim. 29 U.S.C. § 631(a); *see also O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996) (noting that the ADEA "limits the protected class to those who are 40 or older"). Plaintiffs contend

that employees who were not yet forty years old when they were furloughed should be allowed to maintain ADEA claims because they were associated with the aging group. Plaintiffs have absolutely no legal support for this assertion. The Court rejects their attempt to bring ADEA claims for employees who were under forty years of age and will grant defendants' motion to dismiss their claims for failure to meet the first element of the *prima facie* case.

With respect to the plaintiffs who were at least forty years old at the time of the furloughs, their highest hurdle in the *prima facie* case is showing that younger persons were treated more favorably than they were. Plaintiffs argue that the average age of Hudson General's employees is younger than the average age of Shuttle's furloughed fleet service group. The defendants, however, had no role in deciding who Hudson General would hire as its employees. Because defendants had no control over the selection of Hudson General's employees, the average age of Hudson General's employees is irrelevant to this case. Plaintiffs have failed to show that defendants treated younger persons more favorably than plaintiffs. The Court will grant defendants' motion to dismiss their claims for failure to meet the fourth element of the *prima facie* case.

Even if plaintiffs did establish a *prima facie* case of age discrimination, they would still lose their claims at the summary judgment level. Defendants have produced evidence showing that plaintiffs were furloughed for a legitimate, nondiscriminatory reason — to save money by outsourcing the entire department. Plaintiffs must show by a preponderance of the evidence that the defendants' asserted legitimate reason is merely pretextual and that age was "a determining factor" in their furloughs.

Appendix B

Plaintiffs rely on the following evidence to show unlawful motivation: (1) the affidavit and deposition testimony of E. Patricia Evers; (2) statistics showing that the majority of the plaintiffs laid off were over the age of forty; and (3) six documents:

(a) A memorandum labeled at the top "Shuttle, Inc. Corporate Objectives 1992," that includes an objective to reduce costs by developing meaningful early retirement opportunities. Pls.' Ex. 17;

(b) A letter from Joseph P. Martinico on USAir Shuttle stationery, dated June 5, 1992, to Thomas Reinert at Morgan, Lewis & Bockius, stating in its entirety, "Dear Tom: As discussed, enclosed please find both a set of mailing labels and a listing of the USAir Shuttle Fleet Service employees. If there is anything else I can do to assist you, please call me at [phone number]." Pls.' Ex. 18;

(c) A newspaper article from the *Washington Times*, dated November 13, 1993, in which the author wrote that Shuttle President Terry Hallcom "said the shuttle is essentially a 5-year-old company that has employees with 25-year-old seniority." Pls.' Ex. 19;

(d) A memorandum from Terry Hallcom, dated November 5, 1993, to workers at the Shuttle regarding early retirement, in which Hallcom announced that retirement eligible employees had the option of selecting either an early retirement package or the resignation offer, Pls.' Ex. 20;

(e) An undated, unsigned document titled "Number of Employees Reaching 'Normal' Retirement Age," listing the

number of mechanics and the number of fleet service workers who presumably would reach retirement age in the years 1991-2001, Pls.' Ex. 21; and

(f) A memorandum from Terry Hallcom, dated July 30, 1992, to "All Pilots," regarding the company's policies with respect to pilots over the age of sixty.

The Court cannot discern unlawful motivation in the evidence submitted by plaintiffs. E. Patricia Evers testified that she was not involved in the decision and that Hallcom, who was involved in the decision to furlough the fleet service workers, did not tell her why they were furloughed. Evers Dep. at 158-59. She stated that she "wasn't privy" to Hallcom's plans to re-engineer the Shuttle, but that she would see things if they were left in the copying machine sometimes. Evers Dep. at 152. Although she stated that Hallcom used the phrase "old and aging workforce," Evers Dep. at 195-96, Evers could not testify if age was a factor in the decision to furlough plaintiffs because she was not involved in the decision. Evers's testimony, at most, shows that Hallcom knew the ages of the workers and how much it cost Shuttle to keep them employed. Such evidence does not show unlawful motivation. The remainder of plaintiffs' evidence likewise fails to show discriminatory intent in the decision to furlough the fleet service workers. The Court concludes that plaintiffs have failed to create a genuine issue as to whether their furloughs were more probably than not due to age discrimination. The Court will grant the motions of USAir and Shuttle for summary judgment on the ADEA claims.

III. WARN, 29 U.S.C. §§ 2101-09 (1994), Count 14

Plaintiffs claim that defendants violated the Worker Adjustment and Retraining Notification Act ("WARN") because

defendants failed to give plaintiffs sixty days advance notice before furloughing plaintiffs and failed to offer plaintiffs an opportunity to retrain. Plaintiffs also allege that they were denied their WARN rights because of their union activities.

Defendants argue that plaintiffs do not have a claim under WARN because the termination of their employment did not constitute a "plant closing" or a "mass layoff" as defined by the statute. Under the WARN Act, plaintiffs must show that there was a reduction in force "of one or more facilities or operating units within a single site of employment" which, during a thirty day period, terminated the employment of at least thirty-three percent of the employees *and* at least fifty employees. 29 U.S.C. § 2101(a) (1994).

The reduction in force took place at three different locations — Washington National Airport, Boston's Logan Airport, and New York's LaGuardia Airport. Each airport must be considered separately as the three are not a "single site of employment." The only airport that even comes close to having a fifty person layoff is LaGuardia. Plaintiffs claim that forty-four fleet service workers and seventeen "additional" people were laid off at LaGuardia in a thirty day period. These "additional" people were not fleet service workers, but were flight attendants, inside ticket agents, clerks, and a staff accountant.

Defendants claim that forty-three fleet service workers were laid off, and that the "additional" people were not part of the "operating unit" pursuant to WARN regulations, 20 C.F.R. § 639.3(j). Defendants also claim that the "additional" people were discharged for cause or voluntarily resigned, and thus do not come under the WARN definition of "employment loss," 29 U.S.C. § 2101(a)(6).

The Court agrees that these "additional" people cannot count for the fifty person minimum layoff because they were not part of the fleet service "operating unit," as required by the statute. Moreover, plaintiffs have failed to allege that at least thirty-three percent of the employees at LaGuardia were terminated during the same thirty day period. The Court will grant the motions of USAir and Shuttle for summary judgment on the WARN claim.

IV. Barone, *et al.* — option for retirement eligible plaintiffs; Cross-Motion of Shuttle

Nineteen plaintiffs (Barone *et al.*) were fifty-five years of age or older when they were furloughed. These plaintiffs claim they were eligible to retire on November 1, 1993. They did not retire, and around November 13, 1993, they were furloughed from their fleet service jobs. Shuttle gave these plaintiffs a choice of either a retirement package (enhanced medical benefits, lifetime travel, etc.) or severance pay (15 weeks of pay). Furloughed employees who were under fifty-five years old received just the severance pay. Barone *et al.* claim they were entitled to both the retirement package and the severance pay. These plaintiffs claim that the denial of one of the two options was made in violation of the ADEA. They have filed a motion for summary judgment on this issue.

Shuttle has filed a cross-motion for summary judgment on this issue. Shuttle's main argument is that the Shuttle offered *enhanced* benefit options to these older employees. Twenty-one out of the twenty-two retirement eligible employees took the retirement package, which Shuttle claims was far preferable to the severance pay. Shuttle notes that retirement eligible employees were not denied any benefits offered to other

employees, but, on the other hand, were given the option of taking the same exact thing (furlough and severance pay) or a better option (retirement and benefits). Shuttle cites *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), in which the Supreme Court held that an employer does not violate the ADEA when the factors wholly motivating the employer's action are something other than the employee's age, "even if the motivating factor is correlated with age, as pension status typically is." *Id.* at 1706. According to defendants, plaintiffs have failed to establish a prima facie case of age discrimination.

The Court concludes that the Barone *et al.* plaintiffs have failed to present evidence creating a genuine issue as to whether Shuttle's treatment of them was more probably than not due to age discrimination. Plaintiffs' only evidence of age discrimination in the retirement option matter is that retirement eligible employees received a choice and younger employees did not. For the reasons set forth above with respect to the ADEA claims of all plaintiffs, and because Barone *et al.* have presented no evidence that they were treated less favorably than younger employees, the Court will deny the motion of Barone *et al.* for summary judgment and grant the cross-motion of Shuttle.

V. The Validity of the Single Carrier Proceeding

The main issue in USAir's motion for summary judgment and plaintiffs' motion for summary judgment "on the issue of the validity of the single carrier proceeding" is the validity of the National Mediation Board's single carrier proceeding under the Railway Labor Act. Plaintiffs seek a declaration that the proceeding is void and invalid as a matter of law.

Appendix B

Plaintiffs claim that the single carrier proceeding before the NMB was invalid because USAir invoked the jurisdiction of the NMB. A decision in this Circuit, *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir.) (*en banc*), *amended by* 38 F.2d 1224 (1994), *cert. denied*, 115 S. Ct. 1392 (1995), invalidated the regulations of the NMB that allowed carriers to bring labor dispute claims before the NMB in the event of a merger ("the Merger Regulations"). According to *RLEA v. NMB*, the NMB can hear a claim *only* if it is brought by employees or unions.

The single carrier determination in the present case was brought at the joint request of two unions—the Steelworkers and IAM — and the carrier. On May 12, 1992, the IAM filed a letter with the NMB, stating, "[t]he International Association of Machinists and Aerospace Workers, AFL-CIO, ('IAM') joins with USAir, Inc. ('USAir') in its letter of April 2, 1992, and requests that the Board invoke its *Merger Procedures* and find that USAir and Shuttle, Inc. ('USAir Shuttle') are a single carrier for representational purposes under the Railway Labor Act." 2nd Am. Compl. Ex. 8. In *RLEA v. NMB*, the carrier invoked the NMB's jurisdiction without being joined by any union. The Court concludes that the NMB's single carrier determination was valid because the unions joined the petition to invoke the NMB's jurisdiction. Accordingly, the Court does not have jurisdiction to review the single carrier determination. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943).

The next issue before the Court is whether, despite the loss of union representation, plaintiffs were still protected by their collective bargaining agreement. Plaintiffs argue that they were. USAir argues that, under the RLA, loss of representation *means*

loss of the collective bargaining agreement and any obligation to maintain the status quo of the conditions contained in the agreement. This case falls squarely within the reasoning of *International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983), in which the Court of Appeals for the Fifth Circuit stated:

> Given the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements. . . . After a merger that makes the employee group hitherto represented by the Union a minority of the craft, the question of employee representation inevitably arises. When this happens, resolution of that question is the function of the National Mediation Board.

Id. at 164. According to *Texas Int'l Airlines*, the issue of whether plaintiffs were to be represented by a union was within the exclusive, nonreviewable jurisdiction of the NMB. Although the NMB lacks authority to enforce contracts between carriers and unions, *see Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971), the NMB has exclusive authority to govern "representational" disputes, including whether a majority of the employees desire the union's representation and whether two related carriers will be treated as one for representation purposes.

The danger that would arise if the Court were to accept plaintiffs' proposition that their Trump Shuttle–IAM collective bargaining agreement remained in existence after the fleet service

group voted against union representation is that the Court would, in effect, recognize the union as the fleet service group's bargaining agent. A collective bargaining agreement "is not merely a contract negotiated by an agent on behalf of a group of principals, thereafter to be performed and enforced entirely by the principals. It recognizes the Union as the employee's bargaining agent. It delegates to the Union the right to enforce its provisions as the agent of the employees. By its terms the agreement is a *collective bargaining agreement* not a series of individual employment contracts. If the employees designate a new collective bargaining representative, it succeeds to the status of the former representative without alteration in the contract terms. [citations] The agreement cannot survive, however, without some bargaining agent." *Id.* at 163-64.

The Court of Appeals for this Circuit has discussed *Texas Int'l Airlines* in several cases, including *Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906, 912-13 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and *Association of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432, 1440 (D.C. Cir. 1994). In *Association of Flight Attendants v. United Airlines, Inc.*, 71 F.3d 915, 918 (D.C. Cir. 1995), in the context of discussing the *Texas Int'l Airlines* decision, the Court of Appeals noted that, "of course, if the NMB were to subsequently determine that the affected employees fell within a much broader class or craft in which the union did not enjoy majority support, the contractual relationship would necessarily terminate." At least some of the plaintiffs understood that if the combined USAir/Shuttle fleet service group voted against union representation, they would lose their union and their contract:

> Question: What was your concern about no union winning the election?

Answer: Without a union, we have no contract.

DiSpigno Dep. at 186.

The Court concludes that, when plaintiffs were combined with the much larger group of USAir fleet service workers and the combined vote resulted in no union representation, plaintiffs' representation and collective bargaining agreement necessarily terminated. For the reasons set forth above and in the memoranda and argument of USAir, the Court will grant USAir's motion for summary judgment on this issue, which was joined by Shuttle, and deny the motion of plaintiffs.

Plaintiffs also bring an "anti-union animus" claim under the RLA, § 2, Fourth. Section 2, Fourth prohibits carrier interference with employee efforts to organize unions. The leading § 2, Fourth case in this Circuit is *Air Line Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988), *cert. dismissed*, 501 U.S. 1283 (1991). According to that case, an employer is limited to taking only measures that it would have taken in the absence of any anti-union animus. *Id.* at 902. "[U]nions should not be able to immunize their members from market forces merely by engaging in conduct virtually certain to provoke anti-union feeling." *Id.* at 902. In the present case, plaintiffs cite to a comment made by Terry Hallcom, Shuttle President and a former Eastern pilot, to plaintiff James May about how Hallcom might still be flying Eastern planes if the union and Eastern had been able to reach a deal. May, who also used to work for Eastern, agreed that Hallcom's statement about the Eastern situation was "quite possibl[y]" true. Plaintiffs also cite to a memorandum written by Hallcom to a labor relations employee at USAir in which Hallcom advocated a hard bargaining position with the unions.

Hallcom's comment about Eastern does not show anti-union animus. His comment also does not show a causal connection between the alleged animus and plaintiffs' furloughs. The memorandum does not show anti-union animus, either. It merely shows Hallcom's position on bargaining with unions. Hard bargaining, by itself, does not show anti-union animus. Defendants have presented ample evidence that plaintiffs were furloughed to save money; plaintiffs have presented no evidence that their furloughs were caused by anti-union animus. Accordingly, the Court will grant summary judgment for defendants on this issue.

VI. State Law Claims

Plaintiffs bring numerous state law claims. The Court rejects all of plaintiffs' state law claims because such claims are clearly preempted by the Railway Labor Act or ERISA. *See* 29 U.S.C. § 1144(1) ("the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

VII. Motion of IAM

IAM is a defendant in Counts Seven (state law fraud), Fifteen (breach of duty of fair representation), and Sixteen (Age Discrimination in Employment Act). IAM contends that Count Fifteen was filed after the limitation period and must be dismissed as untimely. IAM argues that the state law claim is preempted by the federal claim and must also be dismissed. Finally, IAM claims that it is entitled to summary judgment on the ADEA claim because there is no evidence that IAM caused or attempted to cause the furloughs.

Appendix B

A. Breach of Duty of Fair Representation (Count 15)

Technically, the Railway Labor Act has no "duty of fair representation" provision. In *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 199 (1944), however, as part of a series of cases involving alleged racial discrimination by unions, the Supreme Court recognized that the Railway Labor Act imposes a duty on the union to represent all members of the bargaining unit fairly. Under this doctrine, the union has a duty "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (*quoted in Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 76 (1991)).

IAM argues that this action must be dismissed against it because plaintiffs filed this complaint outside the six month limitation period. Plaintiffs do not challenge that the appropriate limitation period is six months. That time period comes from *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 155 (1983), in which the Supreme Court borrowed the six month period from § 10(b) of the National Labor Relations Act. The Fourth Circuit applied *DelCostello* to a case under the Railway Labor Act in *Triplett v. Brotherhood of Ry., Airline & S.S. Clerks*, 801 F.2d 700, 702 (4th Cir. 1986).

The limitation period began to run when plaintiffs knew or should have been aware of their injury. IAM argues that the period began to run after the election, when plaintiffs lost their union representation. The undisputed facts show the union had no contact with plaintiffs after August 11, 1992, other than telling plaintiffs that it no longer represented them. Plaintiffs were furloughed in March and November 1993, and filed this lawsuit in May 1994.

Appendix B

Plaintiffs' only argument for tolling the limitation period is that they believed the union would continue to represent them after the vote to reject union representation. Although it was clear that they were no longer represented by a union — IAM sent them a letter telling them it no longer represented them; plaintiffs stopped paying union dues to IAM; plaintiffs applied for withdrawal cards and withdrew from the union, *see, e.g.*, Pls.' Answers to IAM's Interrog. 2 — plaintiffs maintain that IAM told them that it would continue to negotiate their integration with USAir regardless of the election results. Plaintiffs claim that it was not until the second group of them was furloughed on November 13, 1993, that they knew, or should have known, that the IAM was not going to negotiate the integration on their behalf. In support of this proposition, plaintiffs cite the following facts:

> (1) A letter dated April 23, 1992, from IAM General Vice President John F. Peterpaul, which was posted at plaintiffs' work stations. Peterpaul describes the background of the single carrier proceeding (which had not yet been decided) and then states that "[w]hen the National Mediation Board approves the petition for the single employer, this will then put us in a posture to sit down and negotiate a full integration agreement with USAir containing the necessary wages, hours and working conditions." In the final paragraph, Peterpaul tells the recipient of the letter, "[y]ou should also advise the Shuttle members that, no matter what the final determination of the NMB, because USAir will control the Shuttle operation and USAir is within the jurisdiction of District Lodge 141, in order to better service our members, the Shuttle contract and our members will be transferred into District 141 as soon as it is appropriate." Pls.' Ex. 134.

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(2) An undated letter to Lou Schroeder from "A Group of Flying Tiger Members" thanking Schroeder and the rest of IAM District 141 for their help in an arbitration. The Flying Tiger Members also thank IAM for allowing Airline Coordinator Bill Scheri to testify for them. They conclude, "We all hope that when the times and conditions are most appropriate, the IAM will make a strong effort to reorganize FedEx, and bring us under the banner of the IAM." Pls.' Ex. 136.

(3) An undated "Opinion and Award" in Seniority Integration in the matter of the arbitration between Federal Express Corporation, Federal Express Mechanics, and former Flying Tiger Mechanics, Stock Clerks and Related Employees. George Kavros, Assistant General Chairman, IAM District Lodge 141, appeared for the Flying Tiger Line Seniority Committee. The opinion notes the testimony of Bill Scheri.

(4) The deposition testimony of Pierre Schrichte, a former plaintiff in this action who has been voluntarily dismissed, that he believed IAM "would do for us what they did for the brother members at Flying Tiger." Schrichte Dep. at 52.

The Court concludes that this evidence fails to raise a genuine issue of material fact about whether IAM told plaintiffs that it would continue to represent them even after it was voted out. The April 23, 1992, letter does not discuss what IAM would do if it lost the election, and nowhere states that IAM would continue to negotiate for plaintiffs if it were no longer their bargaining representative. The evidence about Flying Tiger and the testimony of a voluntarily dismissed plaintiff that he thought

IAM would do for him what it did for Flying Tiger simply does not show that IAM misled plaintiffs into thinking that IAM would continue to negotiate on plaintiffs' behalf after it lost the election. The undisputed evidence shows that plaintiffs knew, shortly after the election, that IAM no longer represented them. Having failed to present any evidence that IAM told plaintiffs it would continue to negotiate on their behalf, the Court finds as a matter of law that plaintiffs' cause of action with respect to IAM accrued as of the date they knew or should have known that they were no longer represented by IAM, August 1992, or, at the very latest, when the first group of plaintiffs was furloughed in March 1993. Plaintiffs did not file this lawsuit until May 9, 1994, well after the six month limitation period. Accordingly, the Court will grant the motion of IAM for summary judgment on Count 15.

B. State Law Fraud & Deceit (Count 7)

IAM argues that the state claim of fraud and deceit is preempted by the federal duty of fair representation under *Vaca v. Sipes*, 386 U.S. 171, 177 & 188-95 (1967). In a Fourth Circuit case with issues similar to the present case, the Court of Appeals held that the federal duty of fair representation preempts identical state law claims. *See Nellis v. Air Line Pilots Ass'n*, 15 F.3d 50, 51 (4th Cir.), *cert. denied*, 115 S. Ct. 56 (1994). At oral argument, when asked to articulate how the state law claim differs from the federal claim, counsel for plaintiffs stated: "Because lying isn't condoned under a collective bargaining agreement. And if you do that, you are subject to state rules concerning it. That's the short answer, Your Honor." Vol. III, Tr. of Mot. Hrg., June 27, 1996, at 86. The Court finds no merit in plaintiffs' argument and agrees with IAM that plaintiffs' state law claim is the same as the federal claim. Accordingly, the state law claim must be dismissed.

C. Age Discrimination (Count 16)

IAM argues that it is entitled to summary judgment on plaintiffs' age discrimination claim because there is no evidence that the union caused or attempted to cause plaintiffs' furloughs. From August 1992, including through the March and November 1993 furloughs, plaintiffs were not represented by IAM. The ADEA makes it "unlawful for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 29 U.S.C. § 623(c). Because there is no evidence of record that IAM had anything to do with plaintiffs' furloughs, the Court will grant IAM's motion for summary judgment on Count 16.

D. Conspiracy

In its opposition memorandum, plaintiffs appear to bring conspiracy claims against IAM that are not in the complaint. Plaintiffs allege that the union acted against plaintiffs with anti-union animus because IAM thought plaintiffs were "scabs." Section 2, Fourth of the Railway Labor Act, discussed above, applies only to carriers. There is no cause of action for a union that allegedly acted with anti-union animus. The Court also notes that plaintiffs have failed to present any evidence that IAM was part of a conspiracy against plaintiffs.

VIII. Motion of Citibank and Citicorp

Citicorp is a bank holding company. Citibank is a lender and agent for a consortium of twenty-two financial institutions which lent approximately $380 million to Donald Trump to purchase Shuttle. Citibank is a shareholder of Shuttle. Plaintiffs claim that John S. Reed, the Chief Operating Officer of Citicorp,

and Wendy Silverstein, a vice president of Citibank and one of the directors of Shuttle, were personally involved in the decision to furlough plaintiffs.

The record overwhelmingly shows that Citicorp and Citibank had no involvement in plaintiffs' furloughs. Plaintiffs' vast conspiracy theory has failed to materialize after discovery. *See* Vol. III, Tr. of Mot. Hrg., June 27, 1996, at 4-46. Although Citibank was actively involved in restructuring Trump's loan and creating Shuttle, Inc. in an attempt to recover some of the money lent to Trump, it is clear that Citibank and Citicorp had no role in managing the operations of the Shuttle. The evidence shows that Citicorp and Citibank are not "carriers" under the RLA, had no involvement in petitioning the NMB for the single carrier determination, were not plaintiffs' "employer," had no involvement in plaintiffs' employee benefit plan, and had no involvement in the decision to furlough plaintiffs. Because plaintiffs have failed to raise any genuine issue of material fact for trial with respect to Citicorp and Citibank's involvement in their employment or their furloughs, the Court will grant the motion of Citicorp and Citibank for summary judgment on all counts.

Conclusion

For the reasons set forth above, the Court will grant the motions for summary judgment of all defendants and deny the motions of plaintiffs. An appropriate Order will issue.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT COURT OF COLUMBIA

No. 96-7233

September Term, 1997
94cv01019

James May, et. al.,

Appellants

v.

Shuttle Inc., et al.,

Appellees

BEFORE: Silberman, Williams and Rogers, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed December 12, 1997, it is

ORDERED that the petition be denied.

Appendix C

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING SUGGESTION FOR REHEARING IN BANC FILED JANUARY 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

No. 96-7233

September Term, 1997
94cv01019

James May, et al.,

Appellants

Shuttle, Inc., et al.,

Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

Appendix D

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Randolph and Garland did not participate in this matter.

APPENDIX E — RELEVANT STATUTES

29 U.S.C. § 626

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum —

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual

is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to —

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum —

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(As amended Pub.L. 101–433, Title II, § 201, Oct. 16, 1990, 104 Stat. 983; Pub.L. 102–166, Title I, § 115, Nov. 21, 1991, 105 Stat. 1079.)

Appendix E

29 U.S.C. § 1001, *et seq.*

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

(Pub.L. 93-406, Title I, § 510, Sept. 2, 1974, 88 Stat. 895.)

Appendix E

45 U.S.C. § 152

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Appendix E

45 U.S.C. §§ 155 AND 156

Sec. 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty

days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be

arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgement of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate; and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those

rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

(May 20, 1926, ch. 347, Sec. 5, 44 Stat. 580; June 21, 1934, ch. 691, Sec. 5, 48 Stat. 1195; June 25, 1948, ch. 646, Sec. 32(a), 62 Stat. 991; May 24, 1949, ch. 139, Sec. 127, 63 Stat. 107.)

Sec. 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt

of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(May 20, 1926, ch. 347, Sec. 6, 44 Stat. 582; June 21, 1934, ch. 691, Sec. 6, 48 Stat. 1197.)

APPENDIX F — CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G — 14 NMB NO. 103 PROCEDURES FOR HANDLING REPRESENTATION ISSUES RESULTING FROM MERGERS, ACQUISITIONS OR CONSOLIDATIONS IN THE AIRLINE INDUSTRY

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

14 NMB No. 103

FILE NO. C-5956

PROCEDURES

July 31, 1987

Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry

PREAMBLE

In the *TWA/Ozark* decision, 14 NMB 218 (1987), the Board committed itself to establishing new procedures for handling representation issues resulting from airline mergers, acquisitions or consolidations. The board stated in *TWA/Ozark* that "[e]xperience has shown that existing procedures are inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger."

These procedures are issued pursuant to the Board's established authority under Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. §152, Ninth.

The Board will utilize its traditional investigatory procedures to determine the facts relevant to the many variations of mergers

and acquisitions. So long as the form and purpose of such mergers and acquisitions are not in derogation of employee rights under Section 2, Ninth, the Board will not inhibit or impede these developments or the full and thorough consideration of the important questions involved. There are factors that will make the Board's role difficult, the competition in the airline industry and the uncertainties of business planning.

The parties must recognize the NMB alone is vested with the final decision-making authority over representation issues. The merging or acquiring carriers are the initiators of the contemplated change and it is their responsibility to keep the NMB fully informed. These carriers will decide the nature and scope of the change and the timing involved. The Board recognizes that consistency in planning, however desirable, may give way to business necessities. The Board's efforts will be advanced by prompt and complete information concerning relevant developments and the reasons involved.

In most cases, the initiating carriers contemplate the creation of a single carrier. This decision, when communicated to the Board in advance of a merger date, will invoke the Board's rules on single carrier status with implications concerning representation rights. The Board has had experience where carriers have merged or attempted to merge and presented the Board with representation issues at a date subsequent to the merger. The difficulties involved with post-merger representation questions are reflected in the Board's decisions.

Mergers that contemplate separate carrier status do not involve the same rules and, in fact, may affect representation rights. Accordingly, the NMB will require information on a continuing basis related to such operations to determine whether the separate status continues in fact.

Appendix G

In summary, the creation, change, and the termination of representation rights are within the province of the Board under the Railway Labor Act. At the same time the airline industry's proper growth and development as an essential component of our Nation's valuable transportation resources should be advanced. There is no conflict in these objectives and the Board intends to carry out its responsibilities through these procedures to afford the industry a greater measure of predictability in this important area.

The Board's principal reliance in the development of these merger procedures has been on the generous response of the industry to a request for guidance in developing sound, objective procedures for dealing with merger-related representation issues.* These findings are based on a comprehensive review of the carriers' and organizations' submissions, prior Board decisions and experience in recent mergers.

SUBPART A — GENERAL PROVISIONS

1) DEFINITIONS

a) The term "merger" as used herein shall mean a consolidation, merger, purchase, lease operating contract or acquisition of control as provided by 49 U.S.C. §1378(b).

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* Pursuant to the NOTICE in this matter, 14 NMB 249 (1987), the Board established an industry-wide proceeding. Participants were provided an opportunity to submit suggested procedures and then to comment on the procedures suggested by other participants. Eleven proposals and eight reply comments were received by the Board. A broad diversity of views was represented in these submissions.

b) The term "carrier" means a common carrier by air as defined in Title II, Section 201, of the Railway Labor Act, 45 U.S.C. §181.

c) The term "organization" means a labor organization and representative as provided by Section 1, Sixth, 45 U.S.C. §151, Sixth, and Section 2, Ninth, 45 U.S.C. §152, Ninth of the Act.

2) APPLICABILITY OF THESE PROCEDURES

These procedures, effective August 1, 1987, shall apply to all organizations and air carriers which intend to engage in or may be affected by a merger which has not, as of that date, received final approval by the United States Department of Transportation.

SUBPART B — SINGLE TRANSPORTATION SYSTEM

1) FILINGS WITH NMB

The carrier will notify the NMB in writing at the same time it files with the Department of Transportation for approval of its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Department of Transportation.

2) MERGER INVESTIGATION

The NMB's investigation shall take the form required by the circumstances such as: interrogatories; document requests; on-site investigations; or hearings. The Board's merger

investigation will determine whether the carriers will operate as a single transportation system. Applicable decisions regarding such investigations include but are not limited to *American/AirCal*, 14 NMB 379 (1987); *Delta/Western*, 14 NMB 291 (1987); *TWA/Ozark, supra.*; *Northwest*, 13 NMB 399 (1986); and *Republic/Hughes Airwest*, 8 NMB 49 (1980).

3) MERGER DECISION: PROSPECTIVE EFFECT

a) After investigation the Board will issue a decision concerning the status of the certifications on the merged carrier. Findings concerning the craft or class lines at the merged carrier may also be appropriate. The Board will endeavor to issue its decision on or before the time of the operational merger.

b) Where the Board finds that the certifications on the acquired carrier should terminate, such termination will be effective on or after the date of the Board decision.

4) REPRESENTATION APPLICATIONS FROM INCUMBENT LABOR ORGANIZATIONS

a) Incumbent organizations on the affected carriers will be allowed, absent unusual or extraordinary circumstances, sixty days from the above-described decision to file a representation application supported by a showing of interest of no less than 35% of the combined craft or class.

b) Evidence of showing of interest from incumbent organizations on the affected carriers may be comprised of, wholly or in part, authorization cards, dues check-

off authorizations or seniority lists with a carrier involved in the merger.

c) All other representation applications will be subject to the standard showing of interest requirements contained in the Board's Regulations at 29 CFR §§ 1206.2 and 1206.5.

d) Failure to meet the above described 35% showing of interest requirement by an incumbent organization will result in dismissal. Such dismissal or withdrawal of an application will not act to impose the one year election bar contained in the Board's Regulations at 29 CFR §1206.4.

5) ELECTIONS

Elections authorized pursuant to Subpart B will be given priority and progressed expeditiously through the balloting process and the final representation decision.

6) SUBSEQUENT REPORTING TO NMB

The Board may require carriers and organizations to inform it in writing of post-merger developments.

SUBPART C — SEPARATE TRANSPORTATION SYSTEMS

1) FILINGS WITH NMB

The carrier will notify the NMB in writing at the same time it files with the Department of Transportation for approval of

its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Department of Transportation.

2) NMB INQUIRY

The Board's inquiry will request from the carriers and organizations appropriate information concerning the separate transportation systems.

3) CONTINUING DUTY TO REPORT

The Board may require carriers and organizations to inform it in writing of subsequent developments.

SUBPART D — MERGER OF OPERATIONS AT A LATER DATE

1) FILINGS WITH NMB

Carriers maintaining separate transportation systems, which subsequently seek to complete a merger of operations, shall notify the NMB at the earliest practicable date prior to the operational merger.

2) APPLICABILITY OF SUBPART B

Such cases shall be handled pursuant to the procedures established herein dealing with single carrier status at Subpart B, paragraphs 1-6.

Appendix G

SUBPART E — SUPPLEMENTARY MATTERS

1) CARRIER INVOCATIONS

Consistent with *TWA/Ozark, supra.*, at 14 NMB 241-242, carriers involved in a merger can invoke the Board's services for a determination of the post-merger status of any NMB certifications.

2) COMMENTS FROM INCUMBENT ORGANIZATIONS

Incumbent organizations on the affected carriers may make relevant comments to the NMB in writing concerning the carriers' submissions and any other pertinent matters.

3) DISTRIBUTION OF INFORMATION

Carriers and organizations will provide other participants with copies of each submission to the NMB by verified certificate of simultaneous service signed by counsel.

4) PUBLIC INFORMATION

The information submitted to the Board by carriers and organizations will be public information.

5) ADMINISTRATIVE FILE NUMBERS

a) Representation applications filed by incumbent organizations pursuant to Subpart B, paragraph 4, will be assigned a file number in the MR-series.

b) Carrier invocations of the Board's services pursuant to Subpart E, paragraph 1, will be assigned a file number in the MT-series.

c) All other submissions under these procedures will be assigned a file number in the M-series.

SUBPART F — EFFECT OF PROCEDURES

1) NO IMPACT OF PROCEDURES ON VOLUNTARY RECOGNITION AGREEMENTS OR PROGRESSION OF GRIEVANCES

a) These procedures are not a bar to the effectuation of voluntary recognitions otherwise permissible under the Act. *See, TWA/Ozark,* 14 NMB 218 at 234 (1987); and *Republic Airlines,* 6 NMB 817 (1979).

b) These procedures shall not act to inhibit the processing of pending grievances otherwise permissible under the Act. *See, Delta/Western,* 14 NMB 291 at 302 (1987).

2) NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT

Existing rights under the Railway Labor Act shall not be enhanced or diminished by these procedures. The Board recognizes that when a dispute involves the interpretation or application of an airline collective bargaining agreement, Section 204 of the Railway Labor Act, 45 U.S.C. §184, provides that it be referred to an appropriate adjustment board for resolution through arbitration.

Appendix G

By direction of the NATIONAL MEDIATION BOARD.

s/ Charles R. Barnes
Charles R. Barnes
Executive Director

Copies to:

Carriers and Labor Organizations in the Airline Industry.

CRB/dss

APPENDIX H — LETTER FROM MORGAN, LEWIS & BOCKIUS TO NATIONAL MEDIATION BOARD DATED APRIL 2, 1992

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
1800 M STREET, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 467-7000
FAX (202) 467-7176

PHILADELPHIA
LOS ANGELES
MIAMI
LONDON
FRANKFURT

WASHINGTON
NEW YORK
HARRISBURG
SAN DIEGO
BRUSSELS
TOKYO

THOMAS E. REINERT, JR.
DIAL DIRECT (202) 467-7084

April 2, 1992

VIA HAND DELIVERY

Mr. William A. Gill, Jr.
Executive Director
National Mediation Board
1425 K Street, N.W.
Washington, D.C. 20572

Re: *USAir – Trump Shuttle Transaction*

Dear Mr. Gill:

This notice is submitted by USAir, Inc. ("USAir") and its holding company parent USAir Group, Inc. ("Group") pursuant

in Subparts A, B, and E of the *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 NMB 388 (1987) ("*Merger Procedures*").

Group and Citibank, N.A. ("Citibank"), a major creditor of the Trump Shuttle, have entered an agreement in principle that once consummated will appoint USAir as the manager of the operations of the Trump Shuttle. Under a final management agreement, which will have a ten year duration, USAir will assume day-to-day operational control of the Shuttle, including labor relations. While USAir conducts operations under the management agreement, Group will hold a non-voting equity interest in the Shuttle corporation. Group will also have an option to acquire the Shuttle after four and one half years.

As part of the transaction leading to USAir's management of the Shuttle, Trump Shuttle, Inc. will incorporate and then merge into a new corporate entity, Shuttle, Inc. The Department of Transportation has approved the transfer of section 401 certificate authority form Trump Shuttle, Inc. to Shuttle, Inc., based in part on the planned USAir management of the Shuttle Operation. *Trump Shuttle, Inc.*, DOT Order 92-3-57 (March 27, 1992). A copy of the DOT's decision is appended for the Board's information.

USAir and Group anticipate that the closing on the management agreement and related corporate agreements with Citibank and the other creditors of Trump Shuttle will occur on April 10, 1992. USAir then will assume operational control of the Shuttle on April 12, 1992. Under the management agreement, USAir will operate the Shuttle as a USAir service held out to the public as "the USAir Shuttle."

Appendix H

It is USAir's and Group's intent that, when USAir assumes operational control of the Trump Shuttle on April 12, 1992, USAir and the Shuttle will be managed as a single carrier for purposes of the Railway Labor Act. Therefore, USAir and Group invoke the Board's jurisdiction under the *Merger Procedures* to confirm that USAir and the Shuttle will constitute a single carrier for purposes of Railway Labor Act representation.

USAir and Group request that the Board terminate any existing certifications on the Trump Shuttle, based upon USAir's April 12, 1992 assumption of operational control of the Shuttle. It is USAir's and Group's information that there are only two existing certifications on the Trump Shuttle:

NMB R-5938
Mechanics and Related Employees
Aircraft Mechanics Fraternal Association

NMB R-6105
Dispatchers
Transport Workers Union

Trump Shuttle, 17 NMB 196 (1990); *Trump Shuttle*, 19 NMB 222 (1992). In addition, the following voluntary recognitions are currently applicable on the Trump Shuttle:

Pilots
Air Line Pilots Association

Flight Attendants
Transport Workers Union

Fleet Service Employees
International Association of Machinists

See Air Line Pilots Ass'n v. Eastern Air Lines, 701 F. Supp. 865, 869 (D.D.C. 1988). Pursuant to the *Merger Procedures*, USAir and Group also request that the Board find that, as a result of the assumption of operational control of the Trump Shuttle by USAir, employees in these crafts or classes on the shuttle are covered by the existing certifications or voluntary recognitions, if any, on USAir.

USAir and Group recognize that, given the timing of this filing, the Board will not be able to complete its investigation and issue a decision concerning this request for a single carrier determination until after the April 12 effective date of the management agreement. Until the Board issues a decision on this request, USAir intends to continue to deal with the unions that represent Trump employees and to forego any integration of the USAir and Trump workforces.

USAir and Group are prepared to assist the Board in the investigation of this transaction under the Board's *Merger Procedures*.

Respectfully submitted,

s/ Thomas E. Reinert, Jr.
Thomas E. Reinert, Jr.
Counsel to USAir and
USAir Group, Inc.

cc:

James T. Lloyd, Esq. - USAir Group, Inc.
John P. Frestel, Jr. - USAir, Inc.
Betty Leach Hawkins, Esq. - USAir, Inc.
Gordon Linkon - Shuttle, Inc.

Appendix H

Terry Hallcom - Trump Shuttle, Inc.
Wendy A. Silverstein - Citibank, N.A.
J. Randolph Babbitt - Air Line Pilots Association
Dee Maki - Association of Flight Attendants
John J. Kerrigan - Transport Workers Union
George J. Kourpias - International Association of Machinists
O.V. Delle-Femine - Aircraft Mechanics Fraternal Association

APPENDIX I — INTEROFFICE MEMORANDUM FROM TERRY V. HALLCOM DATED OCTOBER 5, 1992

USAIR SHUTTLE Interoffice Memorandum

To: All Employees

From: Terry V. Hallcom

Date: October 5, 1992

Subject: SINGLE CARRIER QUESTIONS

As you by now know, the IAM has this morning commenced a job action against USAir. For your general information — all employees that work for the Shuttle are *Shuttle employees* and *not* employees of USAir. The recent single carrier finding by the NMB addressed only *representation* — which labor union represents Shuttle employees — this did *not* impact your status as employees of the Shuttle, governed by the various contracts and working conditions.

Please don't be misled by those who do not work for the Shuttle. USAir may have labor problems; however, do not transpose those problems to the Shuttle! Their problems should be viewed and treated like any other carrier's problem. Our only relationship to USAir is that we have a management agreement with them. We maintain our own FAA and DOT certificates under the name of Shuttle, Inc. d/b/a USAir Shuttle and are owned by a consortium of banks.

Again, I reiterate and reemphasize — we are all *Shuttle employees* — not USAir. Do not misconstrue their problems to be our problems!

Appendix I

Restrain from letting rumors cause you apprehension! Get the facts. If you are confused or feel you are being misled please call your supervisor or this office — we will try to answer or explain any questions you may have.

Keep up the good work and thank you for your support and cooperation.

TVH:prt

APPENDIX J — CONTRACT SECTION 13, *JOB SECURITY*

13. *Job Security*

In recognition of the union's and employee's cooperation and contribution to the improvement of work practices and implementation of efficient methods of job assignments enabling individuals to perform tasks for which they are qualified without regard to previous-traditional-job classification limitations within the I.A.M. jurisdiction of work, as further elaborated in paragraph 1 and 2 above, and because this cooperation permits the cross-utilization of personnel within the unit, and provides the Company with the flexibility to determine the identity and extent of the work that will be performed by the employees covered by this Agreement, the Trump Shuttle agrees as follows:

Each of the former Eastern employees reporting to work on the first day of the Shuttle operations, in accordance with their individual report to work verification, will be granted that during the life of this Agreement he or she will not be subject to a layoff for lack of work and/or a reduction in their assigned job classification and rate of pay. Such individuals will be identified by name and employee number, and classification, as set forth in Attachment 2 to this Agreement.

This guarantee of employment is applicable only to the individuals described above and does not expressly or by implication establish a fixed level of employment within a classification or within the unit or limit the Company's right to take disciplinary action for just cause.

APPENDIX K — NATIONAL MEDIATION BOARD NOTICE OF ELECTION AND SAMPLE BALLOT

[LOGO]

UNITED STATES OF AMERICA
NATIONAL MEDIATION BOARD
NOTICE OF ELECTION

CR-6452
(NMB Case No.)

Washington, D.C.
(Location)

TO ALL CONCERNED:

This will notify you of an election presently being held under the Railway Labor Act involving the following:

FLEET SERVICE EMPLOYEES

OF

USAIR, INC.

SOUGHT TO BE REPRESENTED BY:
UNITED STEELWORKERS OF AMERICA
AND
INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS
AND PRESENTLY

UNREPRESENTED

This election is being conducted by Mediator

s/ F. M. Landers-Crawford
(Signature)

(F. M. Landers-Crawford)
(Print Name)

Appendix K

Section 2, Fourth, of the Railway Labor Act, provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act."

The Railway Labor Act further provides that elections shall be free from interference, influence or coercion, and that it is unlawful for a carrier to interfere with the organization of its employees.

Violations should be reported immediately to the Board Representative in care of the NATIONAL MEDIATION BOARD, Washington, D.C. 20572.

DATE OF MAILING OF BALLOTS Friday, July 10, 1992

DATE AND PLACE OF COUNT OF BALLOTS:
10:00 A.M.
EDT Tuesday, August 11, 1992
Washington, D.C.

THIS IS THE ONLY OFFICIAL NOTICE OF THE ELECTION AND MUST NOT BE DEFACED BY ANYONE.

Appendix K

SAMPLE

[LOGO]

UNITED STATES OF AMERICA

OFFICIAL BALLOT OF
NATIONAL MEDIATION BOARD

CASE NO. CR-6452

Involving
FLEET SERVICE EMPLOYEES
Employees of
USAIR, INC.

July 10, 1992 to August 11, 1992

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act. The National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Rail Labor Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.

Appendix K

If you desire to be represented by: UNITED STEELWORKERS OF AMERICA

Mark an "X" in this square ..... ☐

If you desire to be represented by : INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

Mark an "X" in this square ..... ☐

If you desire to be represented by:

ANY OTHER ORGANIZATION OR INDIVIDUAL
Write name of such organization or individual on the line below:

_____ AND

Mark an "X" in this square ..... ☐

NOTICE

1. This is a SECRET BALLOT. DO NOT SIGN YOUR NAME.

2. Marks in more than one square make ballot void.

3. Do not cut, mutilate, or otherwise spoil this ballot. If you should accidentally do so, you may return the spoiled ballot at once to the Mediator and obtain a new one.

Appendix K

UNITED STATES OF AMERICA
NATIONAL MEDIATION BOARD
RULES OF ELECTION

BALLOTING — In the event the election is conducted by United States Mail, official secret ballots will be mailed by the Mediator to the eligible voters. SHOULD ANY ELIGIBLE VOTER FAIL TO RECEIVE A BALLOT WITHIN A REASONABLE TIME AFTER THE DATE OF THE MAILING OF THE BALLOTS, SUCH VOTER MAY REQUEST A DUPLICATE BALLOT FROM THE NATIONAL MEDIATION BOARD. This request must be signed by the eligible individual and forwarded to THE NATIONAL MEDIATION BOARD, WASHINGTON, D.C. 20572. NO REQUEST WILL BE HONORED IF RECEIVED AFTER *Thursday, August 6,* 1992.

ELIGIBILITY — All employees in the craft(s) or class(es) referred to in this NOTICE OF ELECTION who appear on the payroll of the carrier during the designated period and who retain an employment relationship with the carrier on the date the vote is taken are eligible to vote.

SUPERVISION OF ELECTION — Only the Mediator or Board Representative and an individual voter will be allowed to handle the ballot in order to maintain its secrecy. The Mediator will interpret and

apply the rules governing the election and shall decide on all challenged votes.

ELECTION RESULTS — The Mediator will count and tabulate all ballots at the designated time and place and report the results to the National Mediation Board.

CERTIFICATION — Certification of the organization or individual that has been designated and authorized to represent the employees involved in this dispute will be made by the National Mediation Board.

INSTRUCTIONS (MAIL BALLOT) — An Official Ballot and a return-addressed mailing envelope (no postage required) are enclosed herewith. To vote, mark an "X" in the square of your choice, fold and place the ballot in the mailing envelope. PRINT your name on the first line under the attest on the back of the envelope, and SIGN your name on the seco. d line. Deposit this envelope in the U.S. Mail so as to reach the designated location for the count prior to the time and date indicated on the NOTICE OF ELECTION.

After the envelope has been checked against the eligibility list, your ballot will be removed and thoroughly mixed with other ballots before being unfolded and counted by the Mediator, thus insuring complete secrecy.

By order of the NATIONAL MEDIATION BOARD.

Supreme Court
FILED
MAY 14 1998
CLERK

(2)

No. 97-1674

In the
Supreme Court of the United State

OCTOBER TERM, 1997

JAMES MAY, *et al.*,

Petitioner

vs.

SHUTTLE, INC., *et al.*,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS CITICORP and CITIBANK, N.A.

MARK A. JACOBY
Counsel of Record
WEIL, GOTSHAL & MANGES LL
Counsel for Respondents
Citicorp and Citibank, N.A.
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

11 pp

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Citicorp and Citibank, N.A. make the following disclosure statement: Citicorp is a U.S. bank holding company incorporated under the laws of the State of Delaware, and is a publicly-traded company. Citibank, N.A. is a bank organized under the laws of the United States and is a wholly-owned subsidiary of Citicorp. A list of the non-wholly-owned subsidiaries of Citibank, N.A. is set forth in Appendix A hereto, and a list of the nonwholly-owned subsidiaries of Citicorp (excluding those held through Citibank, N.A.) is set forth in Appendix B hereto.

REASONS FOR DENYING THE WRIT

Although Citicorp and Citibank, N.A. have been identified in the instant petition for a writ of certiorari as respondents (p. iv), none of the "questions presented" in the petition, and none of the arguments presented therein addresses the reasons set forth in the decision below for granting summary judgment to Citicorp and Citibank, N.A. (App. B, pp. 33a-34a).

Accordingly, it appears that Citicorp and Citibank, N.A. were improperly named as respondents in the petition, and the writ should be denied as to these two parties on this ground alone. Respondents Citicorp and Citibank, N.A. otherwise rely upon the reasons for denying the writ set forth in the opposition filed on behalf of respondents USAir, Inc. and Shuttle, Inc.

Dated: May 15, 1998

Respectfully submitted,

MARK A. JACOBY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
Counsel for Respondents
Citicorp and Citibank, N.A.
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

APPENDIX A

CITIBANK, N.A. NONWHOLLY-OWNED SUBSIDIARY ENTITIES
(as of March 31, 1998)

Domestic

Acme Delivery Service, Inc.
AIRXCEL HOLDINGS, INC.
Alarm Holdings, Inc.
Anvil Holdings, Inc.
Beech Hill Hospital LLC
Bobs Holdings, Inc.
BPS Holding Corporation
Cable Systems Holding Company
CareerCom Corporation
Chromcraft Revington, Inc.
Citicorp Mezzanine Partners, L.P.
CMH Holding Corporation
Condere Corporation
Corral America Holdings, Inc.
Cort Business Services
Cuban American Nickel Company
DavCo Food, Inc.
Electrocal Designs, Inc.
Fairmarkets, Inc.
FF Holdings Corporation
Frederick's Fine Chocolates, Inc.
FSI Holdings, Inc.
Galey & Lord Holdings
GCIH, Inc.
GDT Holdings, Ltd.
Glenoit Universal, Ltd.
GVC Holdings
Hancor, Inc.
HAVCO WP, Inc.
Haydon Corporation
HII Holdings, Inc.

Huntsville Television Holding Corp.
Hydrochem Holding, Inc.
IKS Corporation
Industrial Quality Services, Inc.
International Airmotive Holding Corp.
International Media Group
Marine Holding, L.L.C.
Milk Specialties Company
MM Holding Corp.
MS Acquisition Corporation
MSX International, Inc.
NAC Holding Inc.
One Sansome Street Associates
Palomar Technologies Corporation
Pen-Tab Holdings, Inc.
Pinnacle Apparel Group
Plainwell Holding Company
Plantronics Inc.
Polar Tank Holding, Inc.
PTI, Inc.
Pursell Industries Inc.
Rax Restaurants, Inc.
RES Associates of Georgia, Ltd.
Sansome Land Associates
SC Processing, Inc.
Sleep Investor L.L.C.
Sterling Healthcare Corporation
Sterling Holding Company, LLC
Sybron Chemicals, Inc.
TEU Holdings, Inc.
Thermal Engineering International Corporation
Unisa Holdings Incorporated
Vectura Group, Inc.
Vision Metals Holdings, Inc.
WB Bottling Company
World Subordinated Debt Partners, L.P.
Zatarain's Brands, Inc.

Foreign

3C (Hong Kong) Funding Corporation
525 PARTICIPACOES S.A.
Banco de Honduras S.A.
Belapart S.A.
Berlin Real Estate B.V.
Canderel Limitee
CCBC Holdings, Inc.
Celulosa Argentina S.A.
Central Holdings Corporation
Citi-Inmobiliaria e Inversiones, S.A. de C.V.
Citi Center Condominium Corporation
Citi Premier SICAV
Citibank-Maghreb
Citibank Belgium S.A./N.V.
Citibank Canada Real Estate Limited
Citibank Espana S.A.
Citibank Nigeria
Citibank, S.A.
Citicorp Brokerage (India) Limited
Citicorp China Investment Management (BVI) Limited
Citicorp China Investment Management Limited
Citicorp Credit Services India Limited
Citicorp Deutschland Aktiengesellschaft
Citicorp Information Technology Industries Limited
Citicorp Investment Bank (Pakistan) Limited
CITICORP MARUTI FINANCE LTD.
Citicorp Securities and Investments Limited
Citinversiones de Titulos y Valores (Puesto de Bolsa) S.A.
Corredores de Seguros Citicorp Limitada
Diners Club de France S.A.
Diners Club Limited, The
Eletron S.A.
Elfte Gamma Trans Leasing Verwaltungs GmbH & Co.
Finanzierungs-Management KG
FOFIP S.A.

Forestal Santa Lucia S.A.
Gamma Trans Leasing Verwaltungs GmbH & Co. Achte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Dritte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Fuenfte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Neunte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Sechste Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Siebte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Vierte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Zweite Finanzierungs-Management KG
Interchange S.A.
J.D.S. Investments Limited
Leadair Assurances
Leadair Selection
Memo Service
Opportunity Prime Fundo Mutuo de Investimento em Acoes-Carteira Livre
P.T. Citicorp Finance Indonesia
P.T. Citicorp Securities Indonesia
Palace Place Limited Partnership
Paseo Realty and Development Corp.
Premium Finance No. 3 C.V.
Primus Holdings, Inc.
RIBA-Representacoes Participacoes e Administracao Ltda.
Saudi American Bank
Sweet River Fund
The Fourteenth Hong Kong Leasing Partnership
The HOW Limited Partnership

Tissucel S.A.
Usina Bernal S.A.
Valetron S.A.
Zehnte Gamma Trans Leasing Verwaltungs GmbH & Co.
Finanzierungs-Management KG

APPENDIX B

CITICORP NONWHOLLY-OWNED SUBSIDIARY ENTITIES
(Excludes Citibank, N.A. Subsidiary Entities)
(as of March 31, 1998)

Domestic

Citicorp Capital I
Citicorp Capital II
Eagle II
Greater Southwest Community Service Corp.
Lake Terrace Associates
Mission Park Corporation
Neptune Securities Finance, LLC
Student Loan Corporation, The

Foreign

CB Money Fund
Citicorp Chile Fondo de Inversion Mobiliaria
Citicorp Everbright China Fund Limited
Citilife S.A./N.A.

Supreme Court, U.S.
FILED
MAY 14 1998
CLERK

No. 97-1674

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JAMES MAY, *et al.*,
Petitioners,
v.
SHUTTLE, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO IN OPPOSITION

JOHN A. EDMOND
(Counsel of Record)
JEFFREY A. BARTOS
ANNA L. FRANCIS
GUERRIERI, EDMOND & CLAYMAN, P.C.
1331 F Street, N.W.
Suite 400
Washington, D.C. 20004
(202) 624-7400
Counsel for Respondent International Association of Machinists and Aerospace Workers, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the court below properly concluded, in accordance with *Vaca v. Sipes*, 386 U.S. 171 (1967), that petitioners' state-law fraud claim, challenging conduct by a union in its capacity as collective bargaining representative, is preempted by the federal duty of fair representation when the same conduct was also the basis for a fair representation claim?

2. Whether the court below properly concluded that petitioners could not prevail on their Age Discrimination in Employment Act claim against their former union because they had failed to adduce any evidence demonstrating that the union was involved with the decision to terminate petitioners' employment?

3. Whether the court below properly concluded that the National Mediation Board acted within its jurisdiction when it made a representational determination pursuant to a petition filed by a carrier and subsequently joined by a union?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1674

JAMES MAY, *et al.*,

Petitioners,

v.

SHUTTLE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

---

BRIEF FOR RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia granting summary judgment in favor of respondents is unreported. Appendix to Petition for Writ of Certiorari ("Pet. App.") 4a-34a. The United States Court of Appeals for the District of Columbia Circuit adopted the district court's opinion and published the opinion as if it was an opinion of the Court of Appeals. That opinion is reported at 129 F.3d 165.

STATEMENT OF THE CASE

This case arises from petitioners' loss of union representation following an election in 1992 and their subse-

quent loss of employment in 1993, when petitioners were not represented by any union.

Until 1993, petitioners were employed as "fleet service employees" on a succession of airlines operating a shuttle service between Washington, D.C., New York City, and Boston. Most recently, petitioners were employed by Shuttle, Inc., a corporation managed by USAir, Inc., and doing business as the "USAir Shuttle". For most of that period, until August 1992, petitioners were represented for collective bargaining purposes by the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"). Pet. App. 5a-6a.

At the time USAir assumed management responsibilities for Shuttle, it petitioned the National Mediation Board ("NMB") for a determination that USAir and Shuttle were a "single carrier" for labor-relations purposes. On May 12, 1992, the IAM invoked the NMB's jurisdiction in support of USAir's "single carrier" petition. At that time, the fleet service employees at Shuttle, represented by the IAM, numbered approximately 135. The fleet service employees at USAir, who were not represented by any union, numbered approximately 8,000. Pet. App. 7a.

Both the IAM and the United Steelworkers of America petitioned the NMB for an election among the USAir fleet service employees. The successful union, if any, would represent the combined USAir and Shuttle fleet service employees. On August 10, 1992, the NMB granted the "single carrier" petition, holding that USAir and Shuttle would be treated as a single carrier. The election votes of the combined fleet service employees were then counted in the representation election. Less than a majority of the employees voted for union representation and the NMB ruled that no union would be certified to represent these employees. Pet. App. 7a-8a.

On August 31, 1992, the IAM advised each Shuttle fleet service employee, by letter, that they were no longer

represented by a union. Petitioners stopped paying union dues and were generally treated by the USAir Shuttle as unrepresented employees. Pet. App. 8a.

In March 1993, Shuttle unilaterally furloughed thirty fleet service employees, including ten of the petitioners. Thereafter, in November 1993, Shuttle furloughed, or provided voluntary retirement in lieu of furlough to, eighty-eight fleet service employees, including the remaining petitioners. Pet. App. 8a, 8a n.2.

Petitioners filed suit in May 1994. Against the IAM, petitioners claimed a breach of the duty of fair representation, state-law fraud, and violation of the Age Discrimination in Employment Act ("ADEA"). Petitioners alleged that the IAM breached its duty of fair representation by seeking a "single carrier" finding, by not warning petitioners of the consequences of the NMB proceeding, and by failing to protect petitioners after losing the election. Petitioners also brought a state-law fraud claim against the IAM, based on the same pre-election conduct challenged in the fair representation claim, as well as a claim pursuant to the ADEA, alleging that the IAM had caused petitioners' loss of employment.

The IAM moved for summary judgment on all of these claims and the district court ruled in favor of the IAM on each claim. With respect to the fair representation claim, the district court held that petitioners' claim was barred by the statute of limitations. The district court further held that petitioners' state-law fraud claim, based on the same conduct as the fair representation claim, was preempted. Concerning the ADEA claim, the district court found that petitioners had not identified any evidence that the IAM was involved in or caused petitioners' loss of work. Pet. App. 28a-33a. As to the "single carrier" proceeding, the district court found that the NMB's decision was jurisdictionally valid because the IAM and the United Steelworkers of America had invoked the

NMB's jurisdiction seeking a "single carrier" finding. Pet. App. 24a.

Petitioners appealed the district court's decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the district court's decision and adopted its unpublished decision.

REASONS FOR DENYING THE WRIT

With regard to the IAM, the court below properly held that petitioners' duty of fair representation claim preempted their identical state-law fraud claim. Petitioners have not identified any reason for granting a writ of certiorari on this count. Nor have petitioners offered a basis to reject the lower court's findings that petitioners had failed to adduce any evidence to support an age discrimination claim against the IAM. Finally, the lower court's decision concerning the NMB's representational determination was proper.[1]

1. Petitioners appear to challenge the holding below that the duty of fair representation preempts petitioners' state-law fraud claim. Petition for Writ of Certiorari ("Pet.") 18-20. This argument lacks merit. Petitioners' fraud claim hinged on their assertion that the IAM, when it was their collective bargaining representative, made misrepresentations to them concerning matters integral to that representation. Pet. App. 32a. This conduct was also the basis for petitioners' claim of a breach of the duty of fair representation. *Id.* As this Court clearly held in *Vaca v. Sipes*, 386 U.S. 171 (1967), however, *federal* law governs a union's duty of fair representation, a duty which may not be subjected to potentially inconsistent obligations derived from state law. *Vaca*, 386 U.S. at 188-93.

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[1] Petitioners do not challenge the Court of Appeals' decision that petitioners' duty of fair representation claim is barred by the statute of limitations.

Following *Vaca*, the courts of appeals invariably have held that state claims identical to fair representation claims and relating only to a union's conduct as the collective bargaining representative are preempted by the federal duty of fair representation. *See BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am.*, 132 F.3d 824, 830 (1st Cir. 1997); *Nellis v. Air Line Pilots Ass'n*, 15 F.3d 50, 51 (4th Cir. 1994); *Richardson v. United Steelworkers of Am.*, 864 F.2d 1162, 1166-67 (5th Cir. 1989); *Johnson v. Int'l Union Local No. 23*, 828 F.2d 961, 967 (3rd Cir. 1987); *Carter v. Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985); *Maynard v. Revere Cooper Prods., Inc.*, 773 F.2d 733, 735-36 (6th Cir. 1985). The decision of the Court of Appeals below to deny petitioners' state-law claim on this ground is in conformity with these appellate decisions and with this Court's directive in *Vaca*.

Petitioners sidestep this line of precedent and instead argue that this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) saves their claims. Pet. 19-20. But there is no conflict between the decision below and that case. In *Hawaiian Airlines*, this Court held only that state-law claims involving rights and obligations that arise separately from collective bargaining agreements are not "minor disputes" under the Railway Labor Act, 45 U.S.C. §§ 151-188. 512 U.S. at 256-62. This Court did not hold, as petitioners suggest, that all state-law claims which are not "minor disputes" may be maintained in the face of other federal law. Indeed, this Court has recognized that federal labor law preempts state law in a variety of contexts not addressed by *Hawaiian Airlines*. *See generally, Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 n.8 (1988).

Here, no party claims, and no court has held, that the conduct alleged in petitioners' state-law claim constitutes a "minor dispute" subject to mandatory arbitration. Here,

pursuant to *Vaca*, the federal duty of fair representation preempts petitioners' state-law fraud claim as it challenges the IAM's conduct in its capacity as collective bargaining representative.

Nineteen of the petitioners further argue, for the first time in this proceeding, that their state-law claim against the IAM cannot be preempted by the duty of fair representation because they have retired from Shuttle and are no longer covered by the Railway Labor Act. Pet. 20. These petitioners rely upon *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), in which this Court held that retirees are not "employees" as defined by the National Labor Relations Act and are not part of a bargaining unit for the purposes of collective bargaining.

Of course, the *current* retirement status of the nineteen petitioners alters neither the duty of fair representation that the IAM owed to them during their employment nor the fact that the fraud claim is derived from the IAM's conduct prior to their retirement. As with the other petitioners, the misconduct alleged under state law could implicate the duty of fair representation under federal law. In fact, these nineteen petitioners expressly sought recovery pursuant to the federal duty of fair representation for the alleged misrepresentations made by the IAM. These petitioners cannot now claim they were not owed a duty of fair representation due to their status as retirees and seek recovery pursuant to state law.

2. Petitioners also argue that the court below failed to apply the appropriate standard of proof to their claims under the ADEA and instead imposed a heightened burden on them. Pet. 22-25. With regard to the ADEA claim raised against the IAM, however, the lower court found "no evidence of record that IAM had anything to do with plaintiffs' furloughs . . . ." Pet. App. 33a. Petitioners do not now point to any evidence demonstrating

that the IAM participated in or was involved with the decision to furlough petitioners. It is clear that petitioners' ADEA claim against the IAM failed not due to an erroneous standard of proof, but due to a lack of any evidence to support their claim.

3. Petitioners also challenge the NMB's jurisdiction in the single-carrier proceeding, as well as the NMB's conduct of the representation election. To the extent these charges are pertinent to petitioners' claims against the IAM, the IAM incorporates by reference the Brief For Respondents USAir, Inc. And Shuttle, Inc. In Opposition.

CONCLUSION

Respondent IAM respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES MAY, *et al.*,

Petitioners,

v.

SHUTTLE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF USAIR, INC. AND SHUTTLE, INC. IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below, applying the Railway Labor Act, properly declined to disturb the National Mediation Board's representational determination resulting in Petitioners' loss of union representation and properly interpreted such loss of representation as terminating any status quo obligation to continue prior collective bargaining agreement terms.

2. Whether state law claims arising from Petitioners' loss of union representation and loss of collective bargaining rights, including employee benefit provisions, are preempted by the Railway Labor Act and the Employee Retirement Income Security Act.

3. Whether an employee's claim for retirement benefits and severance pay presents any issue under the valid written release requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626, where the employer did not seek any waiver of severance claims from the employee upon retirement.

4. Whether, in applying the standards of *Texas Dep't of Community Affairs v. Burdine* and *McDonnell Douglas Corp. v. Green* to a summary judgment motion against claims under the Age Discrimination in Employment Act and the Employee Retirement Income Security Act relating to a corporate transaction, the court may give weight to the business justification for the transaction.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state the following: Effective February 1997, Respondent USAir, Inc. changed its corporate name to US Airways, Inc. US Airways, Inc. is a wholly-owned subsidiary of US Airways Group, Inc., a publicly-traded company, which prior to February 1997 was named USAir Group, Inc. For purposes of simplicity and continuity with the record below, the name USAir is used in this brief.

On December 30, 1997, Respondent Shuttle, Inc. was purchased by and is operated as a wholly-owned subsidiary of US Airways Group, Inc.

All other parties appearing before this Court and the courts below are identified in the Petitioners' Petition for Writ of Certiorari.

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No. 97-1674

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES MAY, *et al.*,

Petitioners,

v.

SHUTTLE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS USAIR, INC. AND SHUTTLE, INC. IN OPPOSITION

OPINIONS BELOW

The November 12, 1997 judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 129 F.3d 165. It is reprinted in the Appendix to the Petition for Writ of Certiorari, at 1a-3a. The Order and Memorandum Opinion of the United States District Court for the District of Columbia, Hon. Norma

Holloway Johnson, Judge, dated September 5, 1996, *May, et al. v. Shuttle, Inc., et al.*, No. 94 cv 01019, was not published. However, the District of Columbia Circuit adopted the entire opinion of the District Court on November 12, 1997 and published it as if it were an opinion of that Circuit. (Pet. App. 2a). The Memorandum Opinion which is, therefore, now the published opinion of the District of Columbia Circuit is reprinted in the Appendix to the Petition for Writ of Certiorari, at 4a-34a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated November 12, 1997, was entered when Petitioners' timely motion for rehearing was denied without opinion on January 9, 1998. (Pet. App. 35a-36a). This Court has jurisdiction to review the judgment of the District of Columbia Circuit Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The decision of the Court of Appeals for the District of Columbia Circuit involves the application of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

STATEMENT OF THE CASE

Petitioners, eighty-six former airline "fleet service" employees[1], challenge their loss of union representation in August 1992, the resulting loss of their collective bargaining agreement in August 1992, and their loss of employment in March or November 1993.

Petitioners initiated and pursued this litigation against Shuttle, Inc. ("Shuttle"), USAir, Inc. ("USAir"), the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"), and Citicorp and Citibank, N.A.[2] However, the Petition appears directed at only USAir and Shuttle. Petitioners' second amended complaint, filed on October 12, 1994, pled eighteen counts under the Railway Labor Act ("RLA")[3], the Age Discrimination in Employment Act ("ADEA")[4], the Employee Retirement Income Security Act ("ERISA")[5], the Workers Adjustment

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[1] Employees in the "fleet service" craft or class perform aircraft cleaning, baggage handling, and ramp functions. *USAir, Inc.*, 15 NMB 369, 389-90 (1988).

[2] Petitioners failed to name the National Mediation Board as a party, but the NMB participated as *amicus curiae* before the court of appeals.

[3] 45 U.S.C. § 151, *et seq.* (1994).

[4] 29 U.S.C. § 621, *et seq.* (1994).

[5] 29 U.S.C. § 1001, *et seq.* (1994).

Retraining and Notification Act ("WARN")[6], and myriad state law claims against the five defendants. Each of the claims directly or indirectly challenged the status of their union representation, labor contract, or employment.

To assist the Court in understanding the nature of Petitioners' claims, Respondents briefly review the corporate history of Shuttle and the transaction with USAir which gave rise to this litigation, the related representation decisions of the National Mediation Board ("NMB"), and the employment actions involving Petitioners.

A. The USAir-Shuttle Transaction

Petitioners' employer, Shuttle, was created in 1992 as the successor to Trump Shuttle, Inc. ("Trump Shuttle"). Trump Shuttle was formed by Donald Trump in 1989 to acquire the assets used by Eastern Air Lines in operating the Eastern Shuttle. The Eastern Shuttle operation consisted of hourly, non-reservation air service between New York, Washington and Boston. (Pet. App. 5a). The majority of Petitioners are former Eastern and Trump Shuttle employees who worked at LaGuardia Airport in New York, Washington National Airport in Arlington and Logan Airport in Boston. (*Id.*)

While working at Eastern, Petitioners were represented by the IAM, which also represented the Eastern mechanics. (Pet. App. 5a). When Trump Shuttle commenced operations in 1989 it voluntarily recognized the IAM as the representative of the mechanic and fleet service groups and, on July

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[6] 29 U.S.C. § 2101, *et seq.* (1994).

13, 1989, entered into a collective bargaining agreement with the IAM governing these classifications. (*Id.*) This 1989 Trump Shuttle Agreement is the claimed source of Petitioners' contract rights.

Trump Shuttle encountered financial difficulties, never made a profit, and by early 1990 was in dire financial straits. (Pet. App. 6a). Donald Trump and Trump Shuttle financed nearly 100% of Shuttle's purchase price and upgrade costs by borrowing $380 million from two bank groups (the "Banks") for which Citibank acted as agent. (*Id.* at 5a). By 1991, Trump Shuttle confronted imminent liquidation, sale of its assets and layoff of all of its employees. Rather than sell or liquidate Trump Shuttle in a depressed airline market, the Banks agreed to reorganize Trump Shuttle and attempt to improve its operating results in contemplation of selling the company at a later date. (*Id.* at 6a). As part of this effort, the Banks sought an established airline to manage the Shuttle. (*Id.*)

On April 10, 1992, USAir, Trump Shuttle, and the Banks entered into a complex restructuring resulting in Donald Trump transferring his ownership interest in Trump Shuttle to the Banks. Trump Shuttle was merged into a newly created corporation — Shuttle, Inc. — with Shuttle, Inc. being the surviving entity. Shuttle entered into a Management Agreement with USAir whereby USAir would manage Shuttle, with an option to purchase Shuttle after four and one-half years. In April 1992, USAir and Shuttle began

operating the former Eastern Shuttle and Trump Shuttle service as the "USAir Shuttle."[7] (Pet. App. 6a).

B. The NMB Proceedings

The USAir-Shuttle Management Agreement presented difficult and novel labor relations problems. The IAM, which represented the USAir mechanics and Shuttle fleet service employees, conditioned its approval of the management transaction on USAir agreeing to operate Shuttle and USAir as a "single carrier" for purposes of representation under the RLA. While agreeing to operate the two airlines as a "single carrier," and planning to integrate the ground employees (mechanics, fleet service, passenger service), USAir intended to maintain separate groups of flight personnel (*i.e.*, pilots, flight attendants and dispatchers). (Pet. App. 5a-6a). The flight personnel would be separated because Shuttle would continue to operate as a separate airline under its own operating certificates issued by the Department of Transportation and the Federal Aviation Administration (*id.*), and to facilitate sale of the airline in the event USAir did not exercise its option to purchase the Shuttle.

In order to operate USAir and Shuttle as a single carrier for representational purposes, a ruling from the NMB was

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[7] Well after the events giving rise to this litigation, Shuttle's corporate structure and public identity again changed. In February 1997, USAir changed its corporate name to US Airways, Inc. On December 30, 1997, US Airways Group, Inc. acquired Shuttle and it began conducting the operation under the name "US Airways Shuttle" during the first quarter of 1998.

required. The IAM and USAir understood that if the NMB ruled that USAir and Shuttle constituted a single carrier, the IAM's representation of the Shuttle fleet service employees would terminate because the larger group of fleet service employees at USAir was not represented by any union. (Pet. App. 7a). The IAM was attempting to organize the USAir fleet service employees and if the IAM won an anticipated election, it would represent the combined USAir and Shuttle fleet service employees. Both USAir and the IAM anticipated that the combined USAir fleet service group would vote to be represented.

USAir filed for single carrier status with the NMB on April 2, 1992. (Pet. App. 7a). The petition was filed pursuant to Subparts A, B, and E of the *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 NMB 388 (1987) ("Merger Procedures"). In this filing, USAir requested that the NMB find that, as a result of the assumption of management control of Shuttle by USAir, employees in the crafts or classes on Shuttle would be covered by the existing certifications or voluntary recognitions, if any, on USAir. The IAM, in a May 12, 1992 submission to the NMB, joined in invoking the NMB's representation jurisdiction under the Merger Procedures. (Pet. App. 7a).

On April 27, 1992, the United Steelworkers of America ("USWA") petitioned the NMB to represent the fleet service personnel at USAir. Pet. App. 7a; *see* Case No. R-6138, *USAir, Inc.*, 20 NMB 162 (1993). On the same date, the IAM filed an application seeking to represent USAir's fleet

service employees. Ballots were mailed to eligible USAir fleet service employees on July 10, 1992. Shuttle fleet service employees (including Petitioners) were sent "challenge ballots," which were segregated pending the outcome of the single carrier proceeding. *Id.*

On August 10, 1992, the NMB ruled that USAir and Shuttle constituted a "single transportation system" for purposes of union representation under the RLA. *USAir/ Shuttle*, 19 NMB 388, 421 (1992) ("single carrier decision"). As a result of this determination, all existing certifications on USAir were extended to Shuttle and all existing certifications on Shuttle were extinguished. The NMB also determined that the Shuttle fleet service employees would be eligible to vote in a then-pending election involving the USWA and the IAM. 19 NMB at 408, 417-18, 421.

The votes in the fleet service election were counted on August 11, 1992. Petitioners' "challenge ballots" were included in the count. Less than the majority of the eligible voters needed for certification voted. Consequently, no union was certified to represent the USAir/Shuttle fleet service employees. *See USAir, Inc.*, 20 NMB 162 (1993). USWA filed an objection to the conduct of the election. On January 28, 1993, the NMB rejected this challenge and dismissed the election applications. *Id.*

After the August 10, 1992 single carrier decision and the August 11, 1992 fleet service election, USAir, Shuttle and the IAM regarded the fleet service personnel at Shuttle as no longer represented by the IAM. Shuttle treated the fleet service group as non-contract employees and stopped

payroll deductions for their union dues in August 1992. On August 31, 1992 the IAM notified Petitioners that their union representation had terminated. Most of the Petitioners signed union withdrawal cards and Petitioners paid no union dues after August 1992. (Pet. App. 8a).

C. Changes in Petitioners' Employment Status

After August 11, 1992, Shuttle took no immediate action to change Petitioners' wages, benefits or day-to-day working conditions. In March 1993, several weeks after the NMB's January 28, 1993 decision certifying the August 11, 1992 election result, Shuttle began making significant changes in Petitioners' employment terms including increasing hours and reducing wages. (Pet. App. 8a). These changes to the employment terms of the fleet service group were not bargained with the IAM and no objections were made, or grievance filed, by the Petitioners.

In 1993, USAir and Shuttle decided that Shuttle's ground service employees would not be integrated into USAir unless and until USAir exercised its option to purchase the Shuttle. Integration was deferred because of difficulties encountered by the IAM concerning integrating the seniority of the very senior Shuttle mechanics and the resistant USAir mechanics. (Pet. App. 8a).

Following completion of the USAir-Shuttle Management Agreement in April 1992, Shuttle aggressively pursued numerous cost-cutting measures and service improvements. An essential part of the cost-cutting measures involved job force reductions in all classifications — management, pilots, fleet service, mechanics and flight attendants. From April

1992 to August 31, 1995, the total number of Shuttle employees was reduced from 972 to 553. (Pet. App. 8a-9a).

As a part of its cost-cutting efforts, in March 1993 Shuttle contracted with Hudson General Corporation, a nationally recognized airline services firm whose workers were represented by the IAM, to provide overnight airplane cleaning services. (Pet. App. 8a-9a). As a consequence of this, 30 Shuttle fleet service employees who had previously performed overnight cleaning services were furloughed on the basis of seniority.

In November 1993, Shuttle outsourced the remaining fleet service work to Hudson General, and all of Shuttle's remaining fleet service employees at all locations were furloughed. A total of 88 fleet service group employees were furloughed or elected retirement in lieu of furlough. (Pet. App. 8a-9a). The cost of Hudson General providing the fleet service work was 50% less than the Shuttle's cost to perform such services itself. Outsourcing the fleet service work saved Shuttle more than $2.4 million in 1994 and similar amounts annually thereafter. (*Id.*)

The Shuttle retirement plan applicable to fleet service employees contained an early retirement program which allowed all fleet service workers who were 55 years of age or older to elect to retire early. In November 1993, eligible fleet service workers were given the option of either (1) retiring under this existing program (with a one-time opportunity for certain enhanced benefits instituted by Shuttle) in lieu of being furloughed or (2) electing to be furloughed on the same terms as the younger fleet service employees who were not eligible for early retirement. The

early retirement program had certain benefits over the furlough including lifetime medical insurance and travel passes. The furlough program, conversely, had certain benefits over the retirement program (primarily additional severance pay). Eligible fleet service workers could choose either early retirement or furlough. The early retirement option was selected by nearly all of the persons eligible. All remaining fleet service workers were furloughed, provided with two weeks' pay in lieu of notice, and paid severance in accordance with the severance policy for non-contract employees.

D. The District Court Decision

On September 29, 1995, after extensive discovery, Shuttle, USAir, and the other defendants below filed comprehensive motions for summary judgment. Petitioners cross-moved for partial summary judgment. The district court heard oral arguments on all dispositive motions on June 21, 25, and 27, 1996. The district court concluded in its September 5, 1996 opinion that Petitioners' challenge under the RLA to their August 1992 loss of union representation and collective bargaining agreement was meritless as a matter of law. The court also concluded that Petitioners had failed to present a triable issue under ERISA, ADEA, WARN or state law with respect to their claims against Shuttle and USAir.

E. The Court of Appeals Decision

Continuing their blunderbuss litigation strategy, on October 29, 1996 Petitioners appealed from the district court decision on all claims under the RLA, ADEA, ERISA,

WARN, and state law. After argument on October 20, 1997, the court of appeals on November 12, 1997 issued its decision. In an unusual action, the court of appeals panel adopted in its entirety the district court opinion (Pet. App. 2a), writing briefly only to clarify the status of Petitioners' collective bargaining agreement. *Id.* Petitioners' request for reconsideration and suggestion of rehearing *en banc* was denied on January 9, 1998.

REASONS FOR DENYING THE WRIT

I Petitioners' Railway Labor Act and Fifth Amendment Challenge to Their Loss of Union Representation and the Resulting Loss of Collective Bargaining Agreement Rights Seeks to Invalidate a National Mediation Board Representational Determination and Present a Fifth Amendment Issue Not Developed Below.

1. No Constitutional Issue is Presented

In order to pique the Court's interest, Petitioners attempt to present this case as a constitutional issue under the Fifth Amendment. This is not a constitutional case. Neither the circuit court opinion (Pet. App. 1a-3a), nor the district court opinion (Pet. App. 4a-34a) which was adopted by the circuit court, makes any reference to constitutional issues. The complaint asserts no constitutional claims. The Petitioners have never challenged the constitutionality of any statute.

The only reference to the Fifth Amendment in the extensive briefing in this case is a single paragraph in the Reply Brief of the Appellants, filed September 19, 1997 in the District of Columbia Circuit, at 20-21. There, Peti-

tioners argued that the National Mediation Board's August 10, 1992 "single carrier decision" was invalid because it could impact existing collective bargaining agreement rights:

> As Judge Sporkin and Amicus recognize, it is banned by the Constitution itself. United States Constitution, 5th Amendment; *see Perry v. United States*, 294 U.S. 330 (1935). . . . Upholding the district court's contrary conclusion will negate the limitations imposed on the NMB by Congress and by the Constitution.

This obtuse passing reference on appeal was not sufficient to raise a constitutional issue below and does not present an issue worthy for constitutional review on petition for certiorari.

2. Petitioners' Challenge to Loss of Union Representation

The focus of Petitioners' case below was an attempt to invalidate under the RLA the National Mediation Board's representational determinations which resulted in Petitioners' loss of union representation. Petitioners lost their union representation in August 1992, as a result of the NMB's August 10, 1992 single carrier decision, *USAir/Shuttle*, 19 NMB 388, which combined the USAir and Shuttle employees for purpose of representation, and the August 11, 1992 election among the combined USAir/Shuttle fleet service group. *USAir*, 20 NMB 162 (1993). Because the unions lost that election, after August 11, 1992 the IAM and

USAir/Shuttle treated the Shuttle fleet service employees, including Petitioners, as unrepresented.[8] (Pet. App. 8a).

Petitioners asserted below that the NMB lacked jurisdiction to issue the single carrier decision because USAir, a carrier, initiated the merger-related case. Petitioners premised their case entirely upon the court of appeal's decision in *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1032 (1995) ("*RLEA v. NMB*"). In that case, the D.C. Circuit invalidated the NMB's *Railroad Merger Procedures*, 17 NMB 44 (1989), to the extent those procedures permitted carrier-invoked representation proceedings. But the district court properly found as a matter of fact and law that *RLEA v. NMB* had no application to this case, because "the unions joined the petition to invoke the NMB's jurisdiction." (Pet. App. 24a) .

Once the carrier-invocation issue of *RLEA v. NMB* was removed from this case by this finding of fact, the district court was constrained by the general nonreviewability of

---

[8] Under NMB procedures, when the majority of a craft or class does not vote for some representative, the Board dismisses the representation application, and the entire craft or class remains or becomes unrepresented. *Jet Am. Airlines, Inc.*, 13 NMB 96 (1986); *Alitalia Airlines*, 10 NMB 331 (1983); *see Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Russell v. National Mediation Bd.*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); *International Bhd. of Teamsters v. Brotherhood of Ry., Airline and S.S. Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).

NMB representation determinations. The Court has repeatedly emphasized that the NMB's jurisdiction over representation disputes is exclusive and its certification decisions are nonreviewable, including representation determinations related to corporate transactions. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 303 (1943); *see also Western Airlines Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987); *Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *General Comm. of Adjustment of Bhd. of Locomotive Eng'rs v. Missouri K-T-R. Co.*, 320 U.S. 323, 336 (1943). Therefore, the district court correctly determined that it had no jurisdiction to review the Petitioners' loss of union representation pursuant to the NMB's representation procedures.

3. Petitioners' Challenge to Loss of Union Contract

Petitioners alternatively have attempted to attack the NMB's representational decision because of its impact on their collective bargaining agreement. They allege that the NMB's decision resulted in the "nullification of a collective bargaining agreement and employment rights." (Pet. 15). The district court did conclude correctly that "when plaintiffs were combined with the much larger group of USAir fleet service workers and the combined vote resulted in no union representation, plaintiffs' representation and collective bargaining agreement necessarily terminated." (Pet. App. 27a). That principle — *no union / no collective bargaining agreement* — is well-established under the RLA. *International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163-64 (5th Cir. 1983). *See also Association of*

Flight Attendants v. USAir, Inc., 24 F.3d 1432 (D.C. Cir. 1994); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976).

The court of appeals clarified this portion of the district court's decision by examining the precise status of Petitioners' collective bargaining agreement prior to the NMB's decision:

> We note, however, that the collective bargaining agreement between Trump Shuttle, Inc. and the International Association of Machinists and Aerospace Workers expired on December 31, 1989. Thereafter, the only function the agreement could have performed would have been to serve as the temporary 'status quo' while the parties pursued the 'major dispute' collective bargaining procedures of Sections 5 and 6 of the Railway Labor Act. But for the reasons made clear by the district court, Shuttle could have been under no obligation to engage in such bargaining in the absence of a certified representative with which to bargain. Therefore it is unnecessary for us to decide whether any terms of a collective bargaining agreement may survive the loss of union representation (an issue which we previously addressed in passing).

(Pet. App. 2a). Petitioners did not have contractual rights immediately prior to August 11, 1992 — they had a statutory right to the temporary continuation of their expired contract's

terms pending negotiations under Section 6 of the RLA. 45 U.S.C. §156.[9]

This analysis by the circuit court dooms any attempted Fifth Amendment challenge to Petitioners' loss of their collective bargaining agreement. Petitioners did not have a "property right" in a collective bargaining agreement; they had a temporary statutory protection of rates of pay, rules, and working conditions while their union negotiated on their behalf. Once their union lost representation status through the NMB's procedures, the statutory protection of the RLA "status quo" necessarily disappeared.

4. Petitioners' Challenge to Findings of Fact

Petitioners' arguments under the RLA and the Constitution ultimately are premised on a denial of two central findings of the lower courts: (1) that the unions invoked the NMB's jurisdiction to determine the representational status of Petitioners and other USAir/Shuttle employees, and (2) that the Petitioners' collective bargaining agreement had expired by its terms on December 31, 1989. Such factual challenges do not belong before this Court and vitiate Petitioners effort to present an issue under the RLA, or the Fifth Amendment justifying certiorari.

---

[9] The Section 6 "status quo" requirement mandates that the parties continue an agreement's terms until they exhaust the RLA's negotiation procedures, thus extending the terms of a collective bargaining agreement beyond its stated duration. *See Detroit & Toledo Shore Line Co. v. United Transp. Union*, 396 U.S. 142, 150-153 (1969). *See also Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 504-12 (1989).

II This Case Is Not an Appropriate Vehicle for Reviewing Preemption under the Railway Labor Act or the Employee Retirement Income Security Act.

Petitioners attempt to present RLA and ERISA preemption issues, asserting that they raised "valid state law claims for breach of contract, common law fraud, and breach of fiduciary duty" (Pet. 3) and that the lower courts failed to apply the preemption standards of *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

The district court's discussion of preemption, adopted by the court of appeals, is terse: "The Court rejects all of plaintiffs' state law claims because such claims are clearly preempted by the RLA or ERISA." (Pet. App. 28a). The lack of full exposition by the district court or the court of appeals on this issue alone is sufficient grounds for denial of certiorari.

The reason for the lower courts' summary rejection of Petitioners' state law claims as preempted relates to the nature of the claims *as presented by the Petitioners*. Petitioners' state law claims were simply an effort to circumvent their loss of union representation and collective bargaining agreement by operation of the RLA, and to assert under common law that they had "no furlough" protection equivalent to their expired collective bargaining agreement. (Pet. App. 68a). That Petitioners' state law claims were artfully pled issues relating to collective bargaining, and controlled by the RLA, is suggested by Petitioners' description of those claims:

> that the respondent carriers and union fraudulently mislead petitioners as to the nature of the proceedings being pursued in their names, made promises to them concerning their employment which they did not intend to keep, breached their contract of employment, and failed to represent them in good faith before the NMB and thereafter.

(Pet. 18). Clearly, Petitioners through these claims were raising issues of duty of fair representation by the union, duty to bargain in good faith by the carriers, and breach of the collective bargaining agreement, which are all controlled by the RLA.

Respondents argued to the lower courts that Petitioners' state law claims were a preempted effort to circumvent the RLA, citing *Adkins v. General Motors Corporation*, 946 F.2d 1201, 1210 (6th Cir. 1991), *cert. denied*, 504 U.S. 908 (1992) ("The purpose of the doctrine of complete preemption is to prevent one set of rights and obligations from issuing from a collective-bargaining agreement under federal law while contradictory rights and obligations flowed from state law . . . . Plaintiffs cannot be permitted to revive rights deemed extinguished under federal labor law by relying on state common law."). The district court and the court of appeals implicitly accepted Respondents' argument under *Adkins* and rejected Petitioners' state law claims as preempted by the RLA.

Petitioners' state law claims also were pled with repeated references to the alleged denial of pension benefits. For example, the Fourth Claim ("Breach of Covenant of Good Faith and Fair Dealing") alleged that Respondents violated state law by "reducing and interfering with Plain-

tiffs' pension rights and benefits to which they were entitled under a plan governed by ERISA." (Second Amended Compl. Paragraph 140). It is not surprising that the district court summarily applied ERISA preemption to such state law claims.[10]

There is no basis in the record of this case to conclude that the lower courts adopted or applied an inappropriate standard of either RLA or ERISA preemption. Consequently, this case does not present an appropriate vehicle for the Court to examine or give guidance on the appropriate scope of RLA or ERISA preemption.

III Petitioners Present an Issue under the Older Workers Benefit Protection Act, 29 U.S.C. Section 626(f), and *Oubre v. Entergy Operations, Inc.*, Concerning the Validity of an Alleged Waiver Which Also Was Not Developed below.

Petitioners attempt to present a validity of written waiver issue under the Older Workers Benefit Protection Act, 29 U.S.C. Section 626(f), and the Court's decision in *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S. Ct. 838 (1998). This is another issue that was not pled or developed below.

---

[10] As the district court recognized, Petitioners reliance on *Varity Corp. v. Howe*, 516 U.S. 489 (1996), is also misplaced. (Pet. App. 16a). *Varity* dealt with a claim of breach of fiduciary duty by an employer; Petitioners' claims were all pled under Section 510 of ERISA. And *Varity* provides no basis for limiting ERISA preemption in this case.

There is no issue in this case concerning the validity of a written waiver. No issue under Section 626(f) was ever pled by Petitioners below. There is no discussion of Section 626(f) in the district court or court of appeals decisions. And there was no issue below related to the *Oubre* question of the retention of settlement benefits.

The only reference to Section 626(f) in this case, once again, was in a passing reference in the Reply Brief of the Appellants filed September 19, 1997 in the District of Columbia Circuit, at 5. Therein, in discussing those retirement-eligible Petitioners who were offered a choice of retirement in lieu of furlough, Petitioners made a single reference to Section 626(f):

> The period was not thirty days, but hours. They had to make their 'choice' on the day they were furloughed. . . . This violated the OWBPA in at least two aspects: (1) they were not given 45 days to consider their choice (21 days if not part of an exit interview); (2) they were not told in writing to consult an attorney. 29 U.S.C. §§ 626(f)(F), (E).

This subgroup of Petitioners (Barone, *et al.*) had raised below an issue under the ADEA: they claimed that they were wrongfully denied *both* retirement benefits *and* the same severance pay given to junior employees. The issue litigated below was *not* the form of their election under Section 626(f), but Petitioners' claim that they were entitled to dual benefits. Respondents never argued that Petitioners signed written waivers that precluded them from pursuing litigation claims for retirement benefits and severance pay.

The district court addressed the dual benefits issue presented and concluded that Petitioners were not discriminated against on the basis of age because the retirement eligible employees were not treated more adversely than junior employees. (Pet. App. 22a-23a). The district court did not opine on Section 626(f), because there was no written waiver issue presented.

Thus, this litigation does not present *any* issue under OWBPA Section 626(f) and *Oubre*, let alone one that warrants consideration by the Court on petition for certiorari.

IV Petitioners' Assertion That the Courts below Applied a Heightened Burden of Proof Standard Newly Adopted by the Lower Court Is Unsupported and Presents No Issue under the Age Discrimination in Employment Act or the Employee Retirement Income Security Act.

Petitioners assert that the district court decision adopted by the court of appeals applied a "new, heightened burden of proof standard" (Pet. 24) unsupported by this Court's prior decisions. Petitioners' argument plainly mischaracterizes the lower court decisions.

The district court in granting summary judgment on the ERISA claims expressly applied the standards of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991). (Pet. App. 10a-11a). In granting summary judgment on the ADEA claims, the district court applied *Burdine*, *Hazen Paper Co. v.*

Biggins, 507 U.S. 604 (1993), *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), and *Cuddy v. Carmen*, 694 F.2d 853 (D.C.Cir. 1982). (Pet. App. 16a-17a).

What Petitioners apparently are challenging is the district court's citation to *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995), as part of its ERISA analysis. (Pet. App. 10a, 14a). In *Andes*, the D.C. Circuit opined that in a corporate transaction such as a closure or sale, the plaintiffs' burden of proof requires them to show that they were selected based upon "some ERISA-related characteristic special to the unit." *Id.* at 1338. *Andes* does not articulate a new standard under ERISA — it applies the *Burdine* standard to the facts of a corporate transaction. *Andes* recognizes that in such circumstances, the employer can articulate a strong business justification for the transaction, which the plaintiff bears the burden of rebutting by showing the corporate justification to be pretextual. Petitioners have identified no division in the circuits concerning the *Andes* analysis of ERISA claims in a corporate transaction context.

Because the district court applied controlling standards under ERISA and ADEA, and Petitioners have identified no need for clarification by the Court on this issue, there is no basis for certiorari.

CONCLUSION

For the foregoing reason, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 15 1998
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No. 97-1674

In the

Supreme Court of the United States

OCTOBER TERM, 1997

JAMES MAY, *et al.*,

Petitioners,

vs.

SHUTTLE, INC., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS CITICORP and CITIBANK, N.A.

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Citicorp and Citibank, N.A.
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(212) 310-8000

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Citicorp and Citibank, N.A. make the following disclosure statement: Citicorp is a U.S. bank holding company incorporated under the laws of the State of Delaware, and is a publicly-traded company. Citibank, N.A. is a bank organized under the laws of the United States and is a wholly-owned subsidiary of Citicorp. A list of the non-wholly-owned subsidiaries of Citibank, N.A. is set forth in Appendix A hereto, and a list of the nonwholly-owned subsidiaries of Citicorp (excluding those held through Citibank, N.A.) is set forth in Appendix B hereto.

REASONS FOR DENYING THE WRIT

Although Citicorp and Citibank, N.A. have been identified in the instant petition for a writ of certiorari as respondents (p. iv), none of the "questions presented" in the petition, and none of the arguments presented therein addresses the reasons set forth in the decision below for granting summary judgment to Citicorp and Citibank, N.A. (App. B, pp. 33a-34a).

Accordingly, it appears that Citicorp and Citibank, N.A. were improperly named as respondents in the petition, and the writ should be denied as to these two parties on this ground alone. Respondents Citicorp and Citibank, N.A. otherwise rely upon the reasons for denying the writ set forth in the opposition filed on behalf of respondents USAir, Inc. and Shuttle, Inc.

Dated: May 15, 1998

Respectfully submitted,

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APPENDIX A

CITIBANK, N.A. NONWHOLLY-OWNED SUBSIDIARY ENTITIES
(as of March 31, 1998)

Domestic

Acme Delivery Service, Inc.
AIRXCEL HOLDINGS, INC.
Alarm Holdings, Inc.
Anvil Holdings, Inc.
Beech Hill Hospital LLC
Bobs Holdings, Inc.
BPS Holding Corporation
Cable Systems Holding Company
CareerCom Corporation
Chromcraft Revington, Inc.
Citicorp Mezzanine Partners, L.P.
CMH Holding Corporation
Condere Corporation
Corral America Holdings, Inc.
Cort Business Services
Cuban American Nickel Company
DavCo Food, Inc.
Electrocal Designs, Inc.
Fairmarkets, Inc.
FF Holdings Corporation
Frederick's Fine Chocolates, Inc.
FSI Holdings, Inc.
Galey & Lord Holdings
GCIH, Inc.
GDT Holdings, Ltd.
Glenoit Universal, Ltd.
GVC Holdings
Hancor, Inc.
HAVCO WP, Inc.
Haydon Corporation
HII Holdings, Inc.

Huntsville Television Holding Corp.
Hydrochem Holding, Inc.
IKS Corporation
Industrial Quality Services, Inc.
International Airmotive Holding Corp.
International Media Group
Marine Holding, L.L.C.
Milk Specialties Company
MM Holding Corp.
MS Acquisition Corporation
MSX International, Inc.
NAC Holding Inc.
One Sansome Street Associates
Palomar Technologies Corporation
Pen-Tab Holdings, Inc.
Pinnacle Apparel Group
Plainwell Holding Company
Plantronics Inc.
Polar Tank Holding, Inc.
PTI, Inc.
Pursell Industries Inc.
Rax Restaurants, Inc.
RES Associates of Georgia, Ltd.
Sansome Land Associates
SC Processing, Inc.
Sleep Investor L.L.C.
Sterling Healthcare Corporation
Sterling Holding Company, LLC
Sybron Chemicals, Inc.
TEU Holdings, Inc.
Thermal Engineering International Corporation
Unisa Holdings Incorporated
Vectura Group, Inc.
Vision Metals Holdings, Inc.
WB Bottling Company
World Subordinated Debt Partners, L.P.
Zatarain's Brands, Inc.

Foreign

3C (Hong Kong) Funding Corporation
525 PARTICIPACOES S.A.
Banco de Honduras S.A.
Belapart S.A.
Berlin Real Estate B.V.
Canderel Limitee
CCBC Holdings, Inc.
Celulosa Argentina S.A.
Central Holdings Corporation
Citi-Inmobiliaria e Inversiones, S.A. de C.V.
Citi Center Condominium Corporation
Citi Premier SICAV
Citibank-Maghreb
Citibank Belgium S.A./N.V.
Citibank Canada Real Estate Limited
Citibank Espana S.A.
Citibank Nigeria
Citibank, S.A.
Citicorp Brokerage (India) Limited
Citicorp China Investment Management (BVI) Limited
Citicorp China Investment Management Limited
Citicorp Credit Services India Limited
Citicorp Deutschland Aktiengesellschaft
Citicorp Information Technology Industries Limited
Citicorp Investment Bank (Pakistan) Limited
CITICORP MARUTI FINANCE LTD.
Citicorp Securities and Investments Limited
Citinversiones de Titulos y Valores (Puesto de Bolsa) S.A.
Corredores de Seguros Citicorp Limitada
Diners Club de France S.A.
Diners Club Limited, The
Eletron S.A.
Elfte Gamma Trans Leasing Verwaltungs GmbH & Co.
Finanzierungs-Management KG
FOFIP S.A.

Forestal Santa Lucia S.A.
Gamma Trans Leasing Verwaltungs GmbH & Co. Achte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Dritte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Fuenfte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Neunte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Sechste Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Siebte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Vierte Finanzierungs-Management KG
Gamma Trans Leasing Verwaltungs GmbH & Co. Zweite Finanzierungs-Management KG
Interchange S.A.
J.D.S. Investments Limited
Leadair Assurances
Leadair Selection
Memo Service
Opportunity Prime Fundo Mutuo de Investimento em Acoes-Carteira Livre
P.T. Citicorp Finance Indonesia
P.T. Citicorp Securities Indonesia
Palace Place Limited Partnership
Paseo Realty and Development Corp.
Premium Finance No. 3 C.V.
Primus Holdings, Inc.
RIBA-Representacoes Participacoes e Administracao Ltda.
Saudi American Bank
Sweet River Fund
The Fourteenth Hong Kong Leasing Partnership
The HOW Limited Partnership

Tissucel S.A.
Usina Bernal S.A.
Valetron S.A.
Zehnte Gamma Trans Leasing Verwaltungs GmbH & Co.
Finanzierungs-Management KG

APPENDIX B

CITICORP NONWHOLLY-OWNED SUBSIDIARY ENTITIES
(Excludes Citibank, N.A. Subsidiary Entities)
(as of March 31, 1998)

Domestic

Citicorp Capital I
Citicorp Capital II
Eagle II
Greater Southwest Community Service Corp.
Lake Terrace Associates
Mission Park Corporation
Neptune Securities Finance, LLC
Student Loan Corporation, The

Foreign

CB Money Fund
Citicorp Chile Fondo de Inversion Mobiliaria
Citicorp Everbright China Fund Limited
Citilife S.A./N.A.

(5)

No. 97-1674

Supreme Court, U.S.
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MAY 27 1998
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In The

Supreme Court of the United States

October Term, 1997

JAMES MAY, *et al.*,

Petitioners,

vs.

SHUTTLE, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The decision of the lower courts in this appeal nullifies long-standing Constitutional, statutory, and common law rights and disregards judgments of the Court. If the decision is allowed to stand, it will be the infliction of punishment — the removal of employment and statutory rights targeted by the respondents — without the benefit of due process or a trial. This issue is pervasive and has been considered by the Court in at least two considerably different contexts. In *United States v. Lovett*, 328 U.S. 303, 315 (1947), the Court ruled Constitutionally invalid the removal of an employment contract against employees targeted by Congress because of their perceived political views. In *Lynch v. United States*, 292 U.S. 571 (1934), the Court ruled that it would be an unconstitutional interference with property rights guaranteed by the Fifth Amendment for Congress to remove insurance contract benefits for veterans which it authorized but later deemed too expensive in times of economic adversity. This case presents the Court with the same issue in a third context. Through the action of the lower courts, contract rights of petitioners, particularly including substantial rights afforded petitioners by Congress under the Railway Labor Act, were ruled voided because of a representation decision made by the NMB. The lower courts compounded the unconstitutional removal of petitioners' contract rights by simply not addressing the petitioners' significant, *additional* employment related rights under ERISA, 29 U.S.C. § 1001, *et seq.*, and the ADEA, 29 U.S.C. § 621, *et seq.*, as reiterated by the Court only recently in *Oubre v. Entergy Operations, Inc.*, 522 U.S. __, 118 S. Ct. __, 139 L. Ed. 2d 849 (1998) and *Inter-Modal Rail Employees Ass'n v. Atchison, T. & S. R. Co.*, 520 U.S. __, 117 S. Ct. __, 137 L. Ed. 2d 763 (1997).

THE COURT CANNOT CONSIDER RESPONDENTS' CONDUCT IN ISOLATION

There can be no dispute, referencing the record below, petitioners were targeted for removal from the outset of the USAir Shuttle because respondents readily admit this fact. Respondents contend that petitioners were too expensive to be employed by Shuttle because Shuttle was in "dire financial straits."[1] US Airways

1. This was very much in dispute. Shuttle never defaulted on its loan (Cont'd)

Opposition, at 5, 10. Petitioners alleged in their Complaint and demonstrated on the record, on the other hand, that Shuttle had a surplus of cash and that respondents joined together to remove petitioners for various reasons. Shuttle, Banks and US Airways were motivated by age and the fact that ERISA benefits were too high and escalating too fast because of age. Petition at 22-25. IAM was motivated, *inter alia*, by hostility toward the mechanics at Shuttle, whose union IAM wished to replace. Like the cause of action upheld by the Court in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), this case must be considered not in the isolation of individual events but in the context of an overall plan by the respondents acting in concert to remove petitioners from their jobs. The facts were fully set out in the record below, were plainly in dispute, but not properly considered in a summary judgment proceeding.[2]

RESPONDENTS' OPPOSITION INACCURATELY STATE THE RECORD

Offering no substantive response to petitioners' contentions, respondents misstate the record. As an example, respondents USAir and Shuttle contend that the Court should not remand this case for further proceedings in light of *Oubre v. Entergy Operations, Inc.* because petitioners make their claim only as an afterthought, a

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(Cont'd)
to the banks. In September 1993, one month before the furlough of petitioners in November 1993, Shuttle generated excess cash and profits of 1.6 million dollars and predicted the trend would continue. *See* record at B00724B and petitioners' Opening Brief before the circuit court at 37.

2. Citibank's Vice President Silverstein targeted petitioners' collective bargaining agreement just prior to the April 2, 1992 initiation of the merger representation proceeding at the NMB by the banks' hand-picked manager, USAir, as follows:

> Because of the virtual employment guaranties that were granted by Trump [respondent Shuttle. Inc.'s predecessor in interest] in the various collective bargaining agreements, labor claims create a very substantial liability for the Shuttle. [Citation to the record at] B000291. * * * A sale of the [Trump Shuttle] without labor will result in a suit by the Trump labor unions under their collective bargaining agreements for damages resulting from the breach of the non-furlough provisions. . . . [D]amages have been estimated to be quite significant and would dilute the value of the banks' recovery. [Citation to the record at] B00300.

"passing" reference in their last Reply Brief before the circuit court. US Airways, Inc. Opposition at 21. They failed to advise the Court that petitioners Barone et al. raised the 626(f) issue in a specific *motion for partial summary judgment* filed before the **district court** on September 29, 1995 and in their *Opening Brief* before the **circuit court**, on July 22, 1997. Thus, on July 22, 1997 these petitioners anticipated the Court's judgment in *Oubre* when they argued below that:

> a. As noted above, the plaintiffs who were 55 years of age and older were given the option **on the day of the layoff** to choose between the Shuttle's regular severance pay (15 weeks) or its regular early retirement plan. Plainly, the defendants followed none of the requirements of 29 U.S.C. § 626(f) in forcing these plaintiffs (Barone et al.) to make this election. The District Court accepted the defendants' assertion that the early retirement plan was an "enhanced" plan. But at the least, this was in dispute. (*See, e.g.*, [citation to the record] at A01071; A01245 [pp. 199-200].) Once again, the District Court ignored the plaintiffs' proof that § 626(f) was not followed.

[Opening] Brief for Appellants, *May et al. v. Shuttle, Inc., et al.*, Case No. 96-7233, at pages 46-47. (Emphasis in original.) The lower courts rejected petitioners' Section 626(f) claims while refusing to acknowledge the undisputed evidence of record which support those claims. This case plainly should be remanded for consideration in light of *Oubre*.

The circuit court and respondents failed to consider or dispute evidence that petitioners were replaced because of their pension and medical welfare benefits. Petition, at 21-25. In *Inter-Modal Rail Employees Ass'n*, above, the Court unanimously barred the removal of petitioners from jobs under similar circumstances. Although the Court's mandate in *Inter-Modal* was urged upon the circuit court, this Court will find no reference to *Inter-Modal* either in the lower court's decision or in respondents' Briefs in Opposition to this Petition. This case should be remanded for consideration in light of *Inter-Modal* alone.

THE RAILWAY LABOR ACT

The fundamental contract issue before the courts below failed to receive consideration. The lower courts failed to recognize two separate proceedings before the NMB and found erroneously that the single carrier proceeding requested by USAir was brought jointly by two unions (respondent IAM and the United Steelworkers) and the carrier. Petition, Appendix B, at 7a, 24a and 31a. Petitioners noted these errors in their Opening Brief before the circuit court at pages 13, 25-26. Although respondents have no choice but to concede the correct facts, their Briefs in Opposition fail to advise the Court that their current version of the facts is *not* the version accepted by the lower courts.

The omissions and errors are significant because they confuse the record, obscuring the mischief created on Shuttle by USAir's sole initiation of the merger proceeding. If this Court considers the language in *Railway Labor Executives Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir.), *(en banc), as amended*, 38 F.3d 1224 (1994) ("*RLEA v. NMB*"), which the Court approved by its denial of certiorari, 514 U.S. 1032 (1995), it will observe the mischief warned against by the *en banc* court. The decision of the lower courts in this case essentially overrules *RLEA v. NMB* by allowing the NMB to entertain a representation petition brought by a carrier. The *RLEA* court's warning is now overlooked by the minority panel in *RLEA v. NMB* now sitting as the presiding panel in this case below (Judges Silberman and Williams):

> By invoking the Board's jurisdiction, a carrier could create a problem where employees saw none or thrust itself into the center of a representational fray and thus attempt to influence the outcome of any subsequent election. . . . [A] carrier could hasten an election. . . . The timing of a carrier's invocation easily might . . . constitute forbidden "interference, influence or coercion" over employees' designation of their representative. 45 U.S.C. § 152 (Third). Such a scheme does not comport with the Act or with Congress' clearly expressed intent.

RLEA v. NMB, 29 F.3d at 668. The *en banc* court determined that danger lurked when a carrier was allowed to invoke the

jurisdiction of the NMB. The warning in *RLEA v. NMB* came to fruition in the instant case.

The single carrier status petition by USAir at Shuttle was separate from the representational election for the Fleet Service Employees at USAir brought by IAM and Steelworkers. When the NMB decided to send "provisional" ballots to petitioners at Shuttle on July 10, 1992, the ballots contained only the following notice:

This will notify you of an election presently being held under the Railway Labor Act involving the following:

FLEET SERVICE EMPLOYEES

OF

USAIR, INC.

SOUGHT TO BE REPRESENTED BY:

UNITED STEELWORKERS OF AMERICA

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

AND PRESENTLY

UNREPRESENTED

Petition, Appendix K, at 69a.

An analogy may be drawn to an American Citizen receiving an unsolicited ballot to vote in a French election, and having done so loses his American citizenship. The voter can no better "vote" in a French election than could petitioners vote for representation at USAir because they were not employed by USAir. Once more ballots were sent without any explanation of their significance, noting only that the USAir employees were "UNREPRESENTED." The courts below ruled that petitioners lost their contract rights by utilizing the above quoted ballots. The ballots give no notice of possible "DISENFRANCHISEMENT". Petitioners necessarily could not *vote*, that is make an informed choice.

Confusion reigned because the NMB anticipated it would rule in favor of single carrier status and issued the ballots in anticipation of its ruling. It held the ballots when it ruled on single carrier

status one day before the election at USAir. When the ballots were issued, however, the NMB could not give petitioners warning of the significance of the ballots because it had not yet ruled on "single carrier status". As a consequence, only the NMB knew the reason for issuing the ballots to petitioners. The secret was not revealed until an Amicus Brief was later submitted. The concern at NMB was to rule on a petition by a carrier and then render a decision before ballots in the representational election at USAir were counted. Respondents were able to exploit the confusion by misrepresenting the facts and making false promises to the Petitioners of no changes and of workforce merger. *See* Petitioners' Complaint. Indeed, the lower courts confused the two proceedings. This was an impermissible transgression.

The incumbant IAM could not be removed as Petitioners' representative because application of the NMB's Merger Rules could have **"NO IMPACT OF VOLUNTARY RECOGNITION AGREEMENTS."** Moreover, no application for a representational vote was ever made at Shuttle because the IAM was already voluntarily recognized. Lacking such power, the NMB could not act to interfere with petitioners undisputed representation at Shuttle. Thus, the courts below could consider the legal effect, if any, of the NMB conduct. The courts below then made a novel decision declaring Section 6 and the status quo provisions of the Railway Labor Act inapplicable to petitioners, thereby fundamentally unsettling the law and opening the floodgates to the mischief warned of by the *en banc* court in *RLEA v. NMB*. The lower courts' further ruling that petitioners lost all of their contract and statutory rights as a result of these events was an unconstitutional interference with petitioners' property rights. *See United States v. Lovett*; *Lynch v. United States, supra.*

It is undisputed, moreover, IAM was the voluntary incumbent on Shuttle when the ballots were counted. NMB rules cover the exact situation but were not honored:

> 4) *REPRESENTATION APPLICATION FROM INCUMBENT LABOR ORGANIZATIONS*
>
> d) Incumbent organizations on the affected carriers will be allowed, absent unusual or extraordinary circumstances, sixty days from the

> above-described [merger] decision to file a representation application supported by a showing of interest of no less than 35% of the combined class.

14 NMB No. 103 p.391. Petition, Appendix G, at 55a. Thus, respondent IAM had a duty *under the RLA* to petitioners for at least 60 days after the August 10, 1992 NMB single carrier decision. Moreover, no election could be held until the Rule was followed and, in any event, nothing could be done for at least 60 days after August 10, and then only if the incumbent IAM chose to seek a special election under the Rule. Nevertheless, the lower courts ruled that representation was lost and petitioners lost their contract rights on August 11, 1992. Despite the Rule, respondents agreed to terminate union dues deduction at Shuttle immediately; and IAM immediately sent letters, on August 31, 1992, to some petitioners "regretfully" noting its withdrawal as their union because of the NMB decision — all further indications of collusion. Petitioners could not have lost an election, as respondents repeatedly assert, because the only election the NMB had the power to conduct was under Part 4 d) of the NMB's Merger Rules, which was never held. All of this was set out in petitioners' Opening Brief before the circuit court, at 29-31.

Respondents argue that petitioners had no contractual rights to lose in August 1992, only a "temporary continuation of their expired contract's terms pending negotiation under Section 6 of the RLA. 45 U.S.C. § 156." US Airways Opposition, at 16-17. The Court has held emphatically to the contrary in *The Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 150-153 (1969) that the status quo which the parties to a labor dispute are obliged to maintain under the Railway Labor Act consists of those actual, objective working conditions, "broadly conceived," out of which the dispute arose, irrespective of whether such conditions are covered in an existing collective agreement. The status quo is to be maintained "from the beginning of the major dispute through the final 30-day 'cooling off' period" while the procedures of the Act for settling disputes are exhausted. *Id.*, 396 U.S. at 152.

Four statements summarize the truth:

1. NMB was not empowered to act an the petition or USAir, Inc.

2. NMB was not empowered to remove a collective bargaining agreement or contract rights.

3. NMB was not empowered to change contract or collective bargaining rights.

4. None of the exhaustion remedies mandated by the Railway Labor Act and no election within the NMB's power to conduct took place at Shuttle.

As to the crucial question of merger of petitioners into USAir, USAirways now makes a startling admission in its Opposition at page 9. Petitioners were not merged into USAir in 1993 "because of difficulties encountered by the IAM concerning integrating the seniority of the very senior Shuttle mechanics and the resistant USAir mechanics." The simple fact is: *petitioners were not mechanics*; they were baggage handlers (ramp service workers), a separate bargaining unit. According to the respondents, petitioners were not represented by the IAM in 1993. Respondents assert that petitioners lost the August 11, 1992 representation election at USAir and became unrepresented like their USAir counterparts. This is the same election respondents contend cost the petitioners their contract rights.[3] Given this admitted fact, it is clear that respondents fill their Opposition Brief to this Court with double talk. If petitioners were employees at will in 1993, then US Airways was free to integrate the 86 petitioners into USAir's unrepresented ramp service unit, without concern for the IAM. Indeed, this admission by USAir at this late date explodes the myth of respondents' position below that they did not combine together against the petitioners throughout this entire period to remove petitioners from their jobs. USAir invoked NMB merger rules but refused to merge the petitioners. These respondents assured the NMB (and petitioners) that it "will" merge them if the Board finds a single carrier, NMB Single Carrier Decision, 19 N.M.B. 388, 406 (1992). But it had no intention of doing so. This was an accepted fact by the lower courts.

Out of this swirling jumble of false assertions, confusing and misleading representations, procedural rules ignored, *ad hoc* rules

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3. US Airways' representation to this Court that the IAM's resistance in 1993 was the reason for no merger of petitioners into USAir, Inc. also shatters respondent IAM's contention that it was not representing petitioners, at least informally, in 1993 and invalidates the lower courts' dismissal of petitioners' claims against the union, IAM, on limitations grounds (six months, beginning August 11, 1992).

adopted, and new law promulgated by the lower courts, removal of 86 petitioners' livelihoods cannot result. *This palpably unjust result and repeatedly lawless conduct cannot now be the law of the land.* To allow the lower courts' decision and the egregious facts of this case to remain intact would be to allow government and private interference with contract and statutory rights to be so onerous as to reach proportions equal to a Bill of Attainder. *United States v. Lovett, supra*, 328 U.S. at 315 (1947).

Respondent US Airways state "After August 11, 1992, Shuttle took no immediate action to change Petitioners' wages, benefits or day-to-day working conditions." Opposition, at 9. No Section 6 notices were issued to petitioners that their contract rights would be eliminated by USAir's April 2, 1992 request to remove their representative. Shuttle and the 88 petitioners observed the "status quo" provisions of the Railway Labor Act after April 2, 1992. Petitioners expected those procedures and rights to continue until they were merged into USAir, Inc. They expected it because they were told, by their union and by their employers.[4] Indeed, Shuttle President Hallcom did so in writing on October 11, 1992. The NMB single carrier decision "did not impact your status as employees of the Shuttle" which was governed by the "various contracts and working conditions" existing before August 10, 1992. Exhibit 13 to petitioners' Second Amended Complaint (A00194). Shuttle honored the seniority rights of petitioners and *all* of the terms of the collective bargaining agreement and did not repudiate the collective bargaining agreement until the November 1993 furloughs. That some work rules changed in March 1993 does not alter this fundamental fact in this case.[5] Vacations and overtime were

4. On April 23, 1992 the IAM promised petitioners in writing that:

> [5] When the NMB approves the petition for the single employer, this will put us [IAM] in a posture to sit down and negotiate a full integration agreement with USAir containing the necessary wages, hours and working conditions; [6] We have an open Section 6 Notice and wish to continue negotiating an independent agreement for our [Shuttle] Ramp Service members of the new USAir Shuttle; [8] USAir has agreed to this process that there cannot be any integration until the [NMB] makes a final determination.

Second Amended Complaint, ¶ 95 (A00489) and Exhibit 9 thereto.

5. The Court has therefore noted: "It would be virtually impossible to include (Cont'd)

granted in accordance with seniority rights. Medical and dental benefits remained the same. Even the 19 petitioners who were given the illegal waiver of severance pay for retirement on November 13, 1993 were offered benefits accorded by the collective bargaining agreement. Petitioners believed they were under the "status quo" provisions of the Railway Labor Act until they were furloughed. Second Amended Complaint, ¶¶ 83-85. Petitioners should have been notified to the contrary and been allowed to pursue their remedies under the RLA. The lower courts' decision impermissibly and unconstitutionally eliminated these rights for petitioners. Under the Railway Labor Act either a carrier or a union "shall give" written notice of an intended change in agreements "affecting" rates of pay, rules, or working conditions, and that in such case, the carrier may not unilaterally alter rates of pay, rules or working conditions until the controversy has been finally acted upon by the Mediation Board. *Detroit & Toledo Shore Line R. Co.*, 396 U.S. at n.15, 150, 153-155.

The issues are clear:

1. USAir, a carrier, petitioned the NMB requesting the NMB to invoke merger rules and declare single carries status;

2. NMB ruled single carrier status, and without any authority it counted ballots in a separate election at USAir submitted by petitioners at Shuttle before the single carrier ruling;

3. The lower courts then interpreted the NMB rulings to mean that the 86 petitioners immediately lost representation;

4. The lower courts ruled that although the merger rules had been invoked, no merger transpired;

5. Finally, the lower courts, not the NMB, ruled that petitioners lost employment rights guaranteed by the status quo provisions of the RLA and, therefore, by the United States Constitution.

CONCLUSION

The Supreme Court is now being asked to unravel the contorted facts, place legal restrictions on the improper extension of government power exerted to wrongfully remove a contract and statutory rights, and remand this case for further proceedings in accordance with this Court's recent rulings relating to petitioners' ERISA and ADEA rights.

(Cont'd)

all working conditions in a collective bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement." *Detroit and Toledo Shore Line R. Co. v. United Trans. Union*, 396 U.S. at 154-155.

Respectfully submitted,

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